83-1471

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1983

SUSAN MARY NORRIS,

Respondent,

vs.

WILLIAM W. WIRTZ, individually and as trustee, ARTHUR M. WIRTZ, individually and as trustee, ST. LOUIS ARENA CORPORATION, a corporation, ARENA BOWL, INC., a corporation, and WIRTZ CORPORATION, a corporation,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Questions Presented for Review

I. Should a cause of action be implied pursuant to Section 10(b) of the Securities Exchange Act of 1934 for alleged fraud in the sale of securities by an estate?

II. Does a beneficiary of a residual testamentary trust have standing to bring suit pursuant to Section 10(b) of the Securities Exchange Act of 1934 against the trustee for alleged fraud in the sale of securities by an estate?

Parties

The parties are properly designated in the caption. ST. LOUIS ARENA CORPORATION, ARENA BOWL, INC., and WIRTZ CORPORATION are corporations. The ST. LOUIS ARENA CORPORATION and ARENA BOWL, INC. are subsidiaries of WIRTZ CORPORATION (Supreme Court Rule 28.1).

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Opinions Below

The original decision of the United States Court of Appeals for the Seventh Circuit ("appellate court") has been reported as *Norris* v. *Wirtz*, 719 F.2d 256 (7th Cir. 1983), and is set forth in the Appendix at App. 1-24. The defendants petitioned for rehearing, and the appellate court denied rehearing and ordered its original decision to be amended, which order is set forth in the Appendix at App. 56-62.

The memorandum and order of the United States District Court for the Northern District of Illinois ("district court"), granting the defendants' motion to dismiss the complaint, is reported as *Norris* v. *Wirtz*, 551 F. Supp. 46 (N.D. Ill. 1982) and is set forth in the Appendix at App. 25-55.

Jurisdiction

The original decision of the appellate court was entered on October 14, 1983 (App. 1-24). The appellate court entered an order on December 22, 1983, denying the defendants' petition for rehearing and amending the original decision (App. 56-62).

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254 and 2101(c).

Pertinent Statutory Provisions

15 U.S.C. § 78j(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> • • •
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

17 C.F.R. § 240.10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances, under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Statement of the Case

James D. Norris died in 1966 and was the father of the plaintiff-respondent, SUSAN MARY NORRIS ("Susan Norris" or "beneficiary"). Through his Last Will and Testament, he appointed Mary Norris, his wife and the mother of the plaintiff, and the defendant-petitioner WILLIAM W. WIRTZ ("William Wirtz") as co-executors of his estate. The defendant-petitioner ARTHUR M. WIRTZ ("Arthur Wirtz"), the father of William Wirtz, was appointed the successor executor to William Wirtz (App. 102). James D. Norris granted his co-executors "full power and authority at any time or times to sell, mortgage, pledge, exchange or otherwise deal with or dispose of the property comprising my estate upon such terms as they deem best. . . ." (App. 99).

James D. Norris had owned, *inter alia*, forty-nine percent (49%) of the shares of stock of two closely

held corporations, ST. LOUIS ARENA CORPORATION and ARENA BOWL, INC. He had also owned five percent (5%) of the shares of stock of Judge & Dolph, Ltd., another closely held corporation. Defendant-petitioner WIRTZ CORPORATION, controlled by Arthur Wirtz, owned fifty-one percent (51%) of the shares of the stock of ST. LOUIS ARENA CORPORATION and ARENA BOWL, INC. and eighty percent (80%) of the shares of the stock of Judge & Dolph, Ltd.

The Last Will and Testament provided for the funding of two trusts upon the closing of the estate: Trust A for the benefit of Mary Norris and Trust B for the benefit of Susan Norris. William Wirtz was appointed individual trustee of both trusts.

In his Last Will and Testament, James D. Norris acknowledged: "I fully appreciate and recognize that discretionary retention of the securities of such closely held corporations and an orderly liquidation of same would be to the best interests of ARTHUR M. WIRTZ and his family members as well as to my estate and the trusts created hereunder, for which reasons the Trustee nominated by me has accordingly been granted the authorizations, discretions and powers herein provided." (App. 83). He further expressly authorized the individual trustee to: (a) participate in the management of the closely held corporations; and (b) supervise the conduct of the closely held corporations' business (App. 84).

The Last Will and Testament provided procedures for the sale of the testator's minority stock interest in the closely held corporations *by the individual trustee.*

These procedures, which were not applicable to sales from the estate by the co-executors, included a "first opportunity" for the closely held corporations to purchase the securities (App. 85-86); for purchase by the shareholders of the closely held corporations (App. 86), by third parties (App. 86-87), and by the individual trustee (App. 84-85). The Last Will and Testament required the beneficiary's consent to sales only if Trust B was the seller and the individual trustee was the purchaser (App. 84-85, 90).

James D. Norris further provided in his Last Will and Testament that: "The decision and judgment of my Trustee to retain my aforesaid interest, to partially liquidate, or to sell and dispose of my interest in its entirety, shall be final, binding and conclusive, and my Trustee shall not be accountable to any present or future income beneficiaries for his action in the performance and the exercise of the powers and authorizations herein conferred upon such Trustee" (App. 90).

In 1967 and 1968, prior to the funding of the residuary trusts, the co-executors petitioned the Circuit Court of Cook County, Illinois, where the Last Will and Testament was probated, for leave to sell the estate's interests in the closely held corporations. Pursuant to orders of that court, the shares of stock of ST. LOUIS ARENA CORPORATION and ARENA BOWL, INC. were redeemed by said corporations, and the shares of stock of Judge & Dolph, Ltd. were purchased by WIRTZ CORPORATION. Subsequently, when the estate was closed and pursuant to the Last Will and Testament, the assets of the estate were distributed to the legatees, including Trust B.

On December 24, 1980, Susan Norris filed her complaint, alleging, *inter alia*, that the amounts paid to the estate from the aforementioned sales were determined by the *pro rata* asset costs of the businesses and were not at fair market value. She further alleged that the proceeds were inadequate, allegedly known by William Wirtz to be inadequate, and that William Wirtz thereby engaged in a scheme to defraud, in violation of Section 10(b) of the Securities and Exchange Act and Rule 10b-5 of the Securities and Exchange Commission. Jurisdiction was alleged under 15 U.S.C. § 78aa and 28 U.S.C. § 1331. She contemporaneously filed a complaint in the Circuit Court of Cook County, Illinois (App. 49).

Argument

Special and important reasons exist for this Court to grant this petition. The appellate court's decision directly conflicts with this Court's decisions limiting both the types of actions for which a cause of action may be implied pursuant to Section 10(b) and the class of plaintiffs who may bring such actions. *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 463 (1977) and *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975).

I

This Court, in *Santa Fe*, stated that a cause of action pursuant to Section 10(b) "should not be implied where it is 'unnecessary to insure the fulfillment of Congress' purposes' in adopting the Act." 430 U.S. at 477. The two factors for the lower courts to consider in determining whether implying a cause of action is necessary to fulfill Congressional intent are: if the action would implement a policy of full disclosure between the *participants*, to a securities transaction; and if the action is traditionally relegated to state laws. 430 U.S. at 478. The appellate court herein implied a cause of action where the alleged misrepresentations did not occur between the participants to a securities transaction and the action is traditionally relegated to state laws. The present case constitutes an attempt to avoid and circumvent the guidelines this Court established in *Blue Chip Stamps* and *Santa Fe*.

The appellate court erred by implying a cause of action for a testamentary residual trust beneficiary pursuant to Section 10(b) of the Securities Exchange

Act of 1934. As Judge William J. Bauer stated in dissenting from the appellate court's decision: "*This type of case is far better left to state courts*" (App. 23; emphasis supplied). The district court found: "Plaintiff claims that fiduciary Wirtz misled her, his co-executor and the court in valuing those assets. Such are *the stuff of state chancery actions* and, indeed, plaintiff contemporaneously with this action filed an action in state court" (App. 49; emphasis supplied). Both the dissenting appellate court judge and the district court agreed with this Court's decision in *Santa Fe,* 430 U.S. at 477, that "a private cause of action under the antifraud provisions of the Securities Exchange Act should not be implied where it is 'unnecessary to ensure the fulfillment of Congress' purposes' in adopting the Act" (App. 20-21, 50).

The Seventh Circuit previously applied *Santa Fe* correctly in *O'Brien* v. *Continental Illinois Bank & Trust Co. of Chicago,* 593 F.2d 54, 62-63 (7th Cir. 1979). *O'Brien* involved claims made by certain pension funds against the Continental Illinois National Bank and Trust. The pension funds had deposited money with Continental under agreements characterized as either trust agreements or agency agreements. Continental was given the responsibility to make "such investments as in its sole discretion it saw fit, subject to a fiduciary duty of care." 593 F.2d at 57. Continental had purchased stock in companies of which the bank was a substantial creditor. Continental had knowledge of adverse information with respect to the companies.

After reviewing the relevant cases, the appellate court in *O'Brien* held that the alleged non-disclosures of

material facts did not relate to investment decisions, but to other actions plaintiffs might have taken against the trustee for breach of fiduciary duty, which actions were not the proper subject matter of the securities laws. 593 F.2d at 60. The *O'Brien* court specifically noted that the trial judge was reluctant to superimpose upon state fiduciary law "a requirement that trustees inform their beneficiaries of information prior to making investments solely within the trustees' discretion." 593 F.2d at 61. Thus, the *O'Brien* court did not imply a cause of action.

The two policy considerations applied by this Court in *Santa Fe* mandate reversal of the appellate court's decision to imply a cause of action for the beneficiary. Applying this Court's "traditional state court forum" consideration to the instant action, petitioners respectfully submit that Congress did not intend to allow beneficiaries of testamentary residual trusts to challenge the actions of estates, traditionally governed by state courts, in the federal courts merely because the estate sells its securities at a price the prospective beneficiary alleges to be inadequate, fraudulent, or a breach of fiduciary duty. This beneficiary had a traditional forum for such allegations, the Circuit Court of Cook County, Illinois, and instituted an action before that court to pursue her remedy. Innumerable estates own securities, and if the appellate court's decision to imply a cause of action for securities fraud is not reversed by this Court, every estate, trust and fiduciary relationship which arguably involves the sale, proposed sale, purchase, manipulation, or speculation with a security, would become a federal question, resulting in federal courts being overburdened, traditional state law being pre-empted, and inconsistent, con-

fusing and overlapping regulations being imposed on the public.

Congress only intended to implement a "philosophy of full disclosure" between the *participants* to a transaction. 430 U.S. at 478. Applying this Court's ruling in *Santa Fe,* that a cause of action should not be implied where "unnecessary to ensure the fulfillment of Congress' purposes," the beneficiary herein was not a participant. She had no decision regarding the sale by the estate, and thus the alleged misrepresentations were not made "in connection with" a sale or purchase of securities. 15 U.S.C. § 78j(b).

The appellate court erroneously found that the beneficiary had an investment decision and was a participant to these sales (App. 58-61). Although her consent was obtained, under the Last Will and Testament this beneficiary had no decision regarding the estate's sale of the securities prior to the funding of the trust and none even after funding with respect to sales to parties other than to the individual trustee (App. 99). The securities were neither sold nor purchased by the individual trustee, although this was explicitly provided for by the Last Will and Testament (App. 84-85). As the district court found, "James Norris well recognized that his assets in large measure were interests in closely-held corporations shared with Wirtz family members. . . . The carefully spelled out procedures for disposing of shares in the closely held corporations are contrary to the suggestion that 'individual trustee' was somehow shorthand for 'closely-held corporation." (App. 54-55). James D. Norris knew that Arthur Wirtz, William Wirtz and the closely held corporations were the most likely purchasers of his estate's minority stock interest and made a clear and explicit

differentiation between purchases by the closely held corporations and the individual trustee. The appellate court, contrary to the express and explicit testamentary provisions, ignored that distinction in finding that the individual trustee was "virtually" a closely held corporation (App. 60, 85-90).

"The law is clear in Illinois that the intention of the testator governs distribution of his estate." *In re Estate of Sax*, 92 Ill. App. 3d 787, 791, 416 N.E. 2d 309 (App. Ct. 1981). "Courts are without power, under the guise of interpretation, to change a testator's will or to make a new one for him. [Citations omitted.] A court may not distribute the testator's estate according to the court's sense of the equity and justice rather than the testator's intention as expressed in the will." *Continental Illinois National Bank & Trust Co. of Chicago* v. *Bailey*, 104 Ill. App. 3d 1131, 1138-39, 433 N.E. 2d 1098 (App. Ct. 1982).

As the dissenting judge stated:

> I cannot subscribe to the majority's broad interpretation of the will as applying to all instances of apparent self-dealing. . . . Federal securities law does not contemplate the exercise of federal jurisdiction in cases requiring resolution of purely state trust law issues as a prelude to deciding whether fraud existed in a transaction which the plaintiff, at the time, could not control" (App. 61, 23).

The appellate court's labelling the sales to the closely held corporations as sales to the individual trustee is clearly erroneous. "This cryptic conclusion seems to ignore the ancient wisdom that calling a thing by a name does not make it so." *City of Madison Joint School District No. 8* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 174 (1976).

The appellate court's decision illustrates the dangers of a federal court's usurping the traditional province of a state court. The appellate court rewrote the Last Will and Testament by finding that: "It was precisely to prevent self-dealing that the testator gave his daughter the ultimate voice in making the investment decisions 'in connection with' such transactions" (App. 61). Quite the opposite, the testator excluded his daughter from participation in any investment decision except sales by Trust B to the individual trustee (App. 70-72) and forbade any distribution of the principal from Trust B until the beneficiary attained forty years of age (App. 72). It was the individual trustee and not the beneficiary who was authorized: ". . . in his best judgment and discretion to liquidate such securities whenever it is deemed to be to the best interest of the trusts created hereunder and the decision and judgment of my said Trustee shall be conclusive, binding and final and no present or future income beneficiary shall question the decision or good faith of such Trustee" (App. 90).

Accordingly, respondents respectfully submit that the decision of the appellate court is in conflict with *Santa Fe*. The decision is based upon a convoluted, factually inaccurate, and erroneous interpretation of the Last Will and Testament in order to find the magic "consent" it believed was required to satisfy the *Santa Fe* standard. In so doing, it misinterpreted and misapplied the language and intent of this Court's decisions.

II

As the district court found: "There is no controlling case authority on this question since neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has yet decided whether beneficiaires of a sale in Susan Norris' position have standing to maintain a 10b-5 action" (App. 47). The appellate court decided that the beneficiary had standing. This decision directly conflicts with the Court's decision that only *actual* buyers and sellers have standing to bring an implied cause of action pursuant to Section 10(b). *Blue Chip Stamps,* 421 U.S. at 742-47; *Birnbaum* v. *Newport Steel Corp.,* 193 F.2d 461 (2d Cir.), *cert. denied,* 343 U.S. 956 (1952). This case will determine whether the *Birnbaum* rule is still in effect or if it has been "gradually eroded on a case-by-case basis." 421 U.S. at 755.

The appellate court correctly found that "the *actual* sales of the securities held in trust were made by the co-executors of plaintiff's father's estate, and not by the plaintiff" (App. 10) (emphasis supplied). Despite her not being the actual seller, the appellate court circumvented and vitiated the decision of this Court in *Blue Chip Stamps,* 421 U.S. at 747.

The securities were sold by the estate to the closely held corporations. The plaintiff was neither the buyer nor the seller (App. 29-30).

The appellate court erroneously found that Susan Norris was not a "by-stander" because she "experienced the direct impact of the securities transaction, for she was the beneficiary of the trust involved" (App. 11). The appellate court erroneously interpreted this Court's decision in *Blue Chip Stamps* to only deprive standing

to a "by-stander" (App. 11). The appellate court found: "This position is attractive" (App. 11). In so holding, the appellate court cited other decisions in which the courts have violated the *Birnbaum* rule by creating exceptions thereto. *See, e.g., Kirshner* v. *United States,* 603 F. 2d 234, 240-41 (2d Cir. 1978), *cert. denied,* 442 U.S. 909 (1979); *Mallis* v. *Federal Deposit Insurance Corp.,* 568 F. 2d 824, 828-830 (2d Cir.), *cert. granted,* 431 U.S. 928 (1977), *cert. dismissed,* 435 U.S. 381 (1978); and *O'Brien* v. *Continental Bank & Trust Co.,* 593 F. 2d 54 (7th Cir. 1979), wherein the plaintiffs were principals of an agency and beneficiaries of an *inter vivos* trust which actually sold the securities (App. 11-12).

"The virtue of the *Birnbaum* rule, simply stated, in this situation, is that it limits the class of plaintiffs to those who have at least dealt in the security to which the prospectus, representation, or omission relates." *Blue Chip Stamps,* 421 U.S. at 747. This Court further stated that:

> Were we to agree with the Court of Appeals in this case, we would leave the *Birnbaum* rule open to endless case-by-case erosion depending on whether a particular group of plaintiffs was thought by the court in which the issue was being litigated to be sufficiently more discrete than the world of potential purchasers at large to justify an exception. We do not believe that such a shifting and highly fact-oriented disposition of the issue of who may bring a damages claim for violation of Rule 10b-5 is a satisfactory basis for a rule of liability imposed on the conduct of business transactions.

Blue Chip Stamps, 421 U.S. at 755.

Unfortunately, during the ten years since this Court adopted the *Birnbaum* rule, it has undergone "case-by-

case erosion." In the instant action, the erosion is most vivid and almost complete. The plaintiff was the prospective beneficiary of an unfunded residual testamentary trust. The estate's securities were never owned, sold or purchased by the plaintiff, Trust B, or the individual trustee. Accordingly, petitioners respectfully submit that the respondent did not have standing to bring this action.

Conclusion

The appellate court's decision conflicts with this Court's decisions in *Santa Fe* and *Blue Chip Stamps* by erroneously implying a cause of action and finding that the plaintiff had standing.

Wherefore, the petitioners respectfully pray that this Court grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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No. 82-2644

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v.

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Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 80 C 6836--James B. Moran, Judge

Argued May 12, 1983--
Decided October 14, 1983

Before BAUER and WOOD, Circuit Judges, and ROSENN, Senior Circuit Judge.*

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* The Honorable Max Rosenn, Senior Judge of the United States Court of Appeals for the Third Circuit, is sitting by designation.

WOOD, Circuit Judge.** This matter is on appeal from the district court's dismissal of plaintiff Susan Norris' complaint for failure to state a cause of action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78j(b) (1976), and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. Sec. 240.10b-5 (1982). Norris v. Wirtz, 551 F. Supp. 46 (N.D. Ill. 1982). Our jurisdiction is based on 28 U.S.C. Sec. 1291 (1976). Because we believe the district court erred in concluding that plaintiff's cause of action falls outside the ambit of the federal securities laws, we reverse the dismissal of plaintiff's complaint.

** Although Judge Bauer dissents, he graciously contributed to the initial portions of this opinion.

I

The plaintiff's father, James Norris, died in February 1966. His will named his wife, Mary Norris, and defendant William Wirtz as co-executors of his estate. The will also provided that, upon the closing of the estate, any remaining property was to be divided into two trusts, one for the benefit of Mary Norris and the other for the benefit of plaintiff Susan Norris. Defendant William Wirtz was to serve as trustee, and William Wirtz's father, defendant Arthur Wirtz, was named successor trustee.

Among the estate's assets were shares of common stock in three closely-held corporations, St. Louis Arena Corporation, Arena Bowl, Inc., and Judge & Dolph, Ltd. Defendant Arthur Wirtz was chairman of the Board of Directors, and his son, defendant William Wirtz, was president and a

director of each of the three corporations. In addition, defendant Wirtz Corporation, owned by defendants William and Arthur Wirtz, held the controlling interest in each of the same three corporations. What stock the Wirtzes did not own in the three corporations were assets in the estate.

In 1967 and 1968, the co-executors of James Norris' estate, Mary Norris and defendant William Wirtz, filed petitions in probate court seeking leave on behalf of the estate to sell shares of each of the three closely-held corporations in the form of repurchase and redemption of the stock by the corporations. The potential for self-dealing by the Wirtzes is obvious, and, according to the complaint, the Wirtzes took full advantage of the opportunity at the expense of the decedent's daughter. When the estate's stock

interest in the St. Louis Arena Corporation and in Arena Bowl, Inc. were redeemed from the estate by those corporations, the Wirtz Corporation thereby became the sole owner of both corporations. The Wirtz Corporation, in a slightly different manner, directly purchased the estate's minority interest in Judge & Dolph, Ltd. Thus, when the dealing was over, the Wirtzes effectively controlled all three of the closely-held corporations in which the estate had held stock and to that extent became more of a beneficiary under the will than did plaintiff, the decedent's daughter.

Before the stock transactions were routinely approved by the probate court, however, the defendants went to plaintiff several times when she was eighteen and nineteen years old and secured her approval of the stock sales. It was in

the course of inducing her uninformed approval of the sales that the defendants allegedly made the false statements substantially affecting the value and fair price of the stocks they were thereby acquiring.

II

Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder were intended to provide a cause of action for any plaintiff who suffers an injury as a result of manipulative or deceptive practices made in connection with his or her sale or purchase of securities. Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 476 (1977). The issue presented here is whether plaintiff Susan Norris actually had the power under the will to control the sale of the securities to the corpo-

rations controlled by defendants so as to establish a nexus between the misrepresentations made to the plaintiff by defendants and the securities sales.

The district court below concluded that although the plaintiff had standing to sue because of her position as a trust beneficiary of a securities sale, the misrepresentations made to plaintiff were only breaches of a trustee's fiduciary duties cognizable under state law. The court found that the plaintiff had no power to influence or control the defendant-trustee's investment decisions so that the defendant's misrepresentations to her were not made "in connection with the purchase or sale" of a security as required by the federal securities laws. Although we agree with the district court that plaintiff has alleged deception on the part of the defendants sufficient to

satisfy Santa Fe Industries and agree with much of the court's discussion of standing, we disagree with its interpretation of plaintiff's ability under the will to control the stock sales at the time defendants' misrepresentations were made and consequently its determination that plaintiff has failed to state a cause of action under Section 10(b) and Rule 10b-5.

The complaint alleges that defendants misrepresented the value of the corporate assets and misrepresented that the proposed stock redemptions were in the best interest of the estate. At the present stage, involving an appeal from a decision to dismiss the complaint, the allegations in the complaint should be read liberally, and the plaintiff should be entitled to the benefit of all inferences. Accordingly, we agree with the district court that plaintiff has made

sufficient allegations of deception by the defendants to satisfy the requirements for a Section 10(b) or Rule 10b-5 violation announced in Santa Fe Industries. See Atchley v. Qonaar Corp., 704 F.2d 355, 359 (7th Cir. 1983).

In addition to alleging manipulative or deceptive practices, a potential plaintiff must fit within the contours of the Birnbaum rule, established in Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952), and adopted by the Supreme Court in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), to maintain an action under Section 10(b) or Rule 10b-5. This "standing" requirement was invoked for various prudential and policy reasons to limit the class of plaintiffs who may sue under the federal securities laws and differs from ordinary Article III uses of

standing. See Eason v. General Motors Acceptance Corp., 490 F.2d 654, 657 (7th Cir. 1973), cert. denied, 416 U.S. 960 (1974) (pre-Blue Chip decision).

The Birnbaum rule requires that a private party have actually dealt in a security, either as a purchaser or a seller, to have standing to bring a federal cause of action for damages. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 747 (1975). In this case, the actual sales of the securities held in trust were made by the co-executors of plaintiff's father's estate, and not by plaintiff. Nonetheless, the district court, relying principally on Heyman v. Heyman, 356 F. Supp. 958 (S.D.N.Y. 1973), and Hackford v. First Security Bank of Utah, N.A., 521 F. Supp. 541 (D. Utah 1981), concluded that the plaintiff was a seller even though she did not--and indeed could not--personally

perform the mechanics of the sale. The rationale behind the decision is that the plaintiff experienced the direct impact of the securities transaction, for she was the beneficiary of the trust involved.

This position is attractive. The plaintiff is not a by-stander as contemplated in Blue Chip Stamps, and to grant standing under these circumstances seemingly does not threaten the concerns expressed in Birnbaum. See, e.g., Kirshner v. United States, 603 F.2d 234, 240-41 (2d Cir. 1978), cert. denied, 442 U.S. 909 (1979) ("We think the beneficiary of a pension trust, like the shareholder in a derivative suit, has standing to attack securities frauds perpetrated or threatened by the trustees of his fund."); James v. Gerber Products Co., 483 F.2d 944, 948 (6th Cir. 1973) ("[T]he courts have generally inclined to a logical and

flexible construction of the term 'purchaser-seller' in order to accommodate the avowed purpose of Sec. 10(b) of protecting the investing public and of ensuring honest dealings in securities transactions."); accord Mallis v. Federal Deposit Insurance Corp., 568 F.2d 824, 828-30 (2d Cir.), cert granted, 431 U.S. 928 (1977), cert. dismissed, 435 U.S. 381 (1978) (per curiam) (pledgees of stock certificates have standing to sue under Section 10(b) and Rule 10b-5). This court anticipated this interpretation of the scope of the Birnbaum rule in O'Brien v. Continental Illinois National Bank & Trust Co., 593 F.2d 54 (7th Cir. 1979). In O'Brien the plaintiffs, themselves trustees of pension funds, charged securities violations against Continental Bank, to which funds of the pension trust were turned over for investment. The plaintiffs argued that

had the bank disclosed that it was purchasing securities for the pension trust funds in companies for which it was also a major creditor, they would have terminated the trust or agency agreement with the bank. This court wrote:

> With respect to the purchases made by Continental, plaintiffs do not fit as neatly into the categories of persons to whom the Birnbaum rule denies the 10b-5 remedy. See Blue Chip Stamps, 421 U.S. at 737-738, 95 S.Ct. 1917.
>
> Continental argues, however, that it and not plaintiffs purchased the stock and, therefore, the Blue Chip rule applies. Although some judges and commentators have interpreted Blue Chip as Continental does, we are unable to say categorically that plaintiffs, on whose behalf Continental bought, were not in any sense purchasers of the securities.

Id. at 59 (footnote omitted).

In O'Brien, we recognized that although the plaintiffs may have had standing under Section 10(b) and Rule 10b-5, a cause of action under those provisions could not be implied in the

circumstances of that case. The O'Brien plaintiffs had no right to be consulted about the proposed investments nor to vote investment decisions. Consequently, the nondisclosures to plaintiffs were not made in connection with the sale of any security in which the plaintiffs were decision makers. We cautioned that "a court should be reluctant to imply a 10b-5 cause of action for wrongs that do not fall within Sec. 10(b)'s fundamental purpose of requiring full and fair disclosure to participants in securities transactions of the information that would be useful to them in decidng whether to buy or sell securities." Id. at 60 (citation omitted). Because the O'Brien plaintiffs had no investment decision to make regarding the securities, the nondisclosure did not affect a decision whether to "buy or sell the securities in

question" but merely "whether plaintiffs should terminate the trust or agency agreements or, perhaps, take some action against Continental." Id. at 60.

Unlike O'Brien, however, the present case involves a plaintiff who had authority to make the investment decisions involving the securities sales in which the alleged misrepresentations were made. Although superficially concealed by the form of the transactions, the nexus between the alleged misrepresentations to plaintiff and the securities transactions are there in substance. James Norris' will establishing the trust generally provides that the trustee is to have full and unquestioned power to make investment decisions regarding the trust property. But the will does give James Norris' daughter, plaintiff here, the power to approve the sale of any stock by the

trustee if the trustee is to be the purchaser. The will states: "Nothing herein contained shall be construed to prevent the individual Trustee . . . from becoming a purchaser of any of such securities . . . provided he has the approval of the income beneficiaries . . . ." (R. 17, Ex. A at 11) (emphasis added). The district court reasoned that since defendant-trustee William Wirtz "was not purchasing the stock but, rather, the closely-held corporations were the purchasers," Norris v. Wirtz, 551 F. Supp. 46, 52 (N.D. Ill. 1982), the will provision was inapplicable and plaintiff had no investment decision to make.

The district court's perception that this case involves only a breach of a trustee's fiduciary duty that traditionally belongs in the state court is not supported by the facts that exist here.

The will requires the plaintiff's approval of any self-dealing transaction by an individual trustee. We believe that the purchases by the close corporations controlled by defendants William and Arthur Wirtz were in fact, or virtually, a purchase by defendant-trustee William Wirtz, so that plaintiff's prior approval of the sale was essential under the will. Certainly the Wirtzes believed the testamentary provision to be applicable. Before each of the securities sales to the close corporations controlled by defendants, defendant-trustee William Wirtz, allegedly assisted by successor trustee Arthur Wirtz, solicited plaintiff's approval.

The broad proscription against fraud set forth in Section 10(b) and Rule 10b-5 is defeated in its remedial purposes by taking an unrealistic view of what is

alleged to have happened in this case. See Herman & MacLean v. Huddleston, 103 S.Ct. 683 (1983). Because we believe plaintiff's approval was required under the will, plaintiff fits within the contours of the Birnbaum rule and has stated a cause of action by alleging misrepresentations "in connection with" the sale of securities. Although this case could no doubt be remodeled into a state court suit, Congress gave plaintiff a choice. Plaintiff should have the opportunity to prove her federal claim.

The judgment dismissing the plaintiff's claim is reversed. The case is remanded to the district court for further proceedings consistent with this opinion.

BAUER, Circuit Judge, dissenting. The majority opinion is so persuasive that, but for one important factual disagree-

ment, I could have written it myself. Nevertheless, I must dissent because in my opinion the plaintiff did not have the power to control the trustee's investment decisions necessary to create federal jurisdiction under the Securities Exchange Act.

The difficulty in sustaining a cause of action in this case, as recognized by the district court, is that the plaintiff in fact had no power to control or even influence the defendant-trustee's decision to sell the securities. The will establishing the trust states: "The Trustee shall have full power to . . . sell, exchange, or pledge any or all of the trust property he deems proper . . . for such purposes as the Trustee deems advisable." The will also states: "[T]he decision and judgment of my said Trustee shall be conclusive, binding and final and

no present or future income beneficiary shall question the decision or good faith of said Trustee." (R. 17, Ex. A at 8-10). Similar statements grant the executors uncompromised power to administer the estate as a whole. Thus, the will clearly bars the plaintiff from influencing or challenging the trustee's decisions.

Because the plaintiff had no input into the decision to sell the stock, the defendants' misrepresentations to her were not made "in connection with the purchase or sale of any security." O'Brien v. Continental Illinois National Bank & Trust Co., 593 F.2d 54, 60 (7th Cir. 1979). See Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 477 (1977) ("[A] private cause of action under the antifraud provisions of the Securities Exchange Act should not be implied where it is 'unnecessary to ensure the fulfillment of Congress'

purposes' in adopting the Act.").

The plaintiff argues in opposition to this conclusion that it is enough to state a cause of action that the plaintiff would have petitioned the probate court to disapprove the stock transaction. In O'Brien, this court discussed and rejected the argument that the plaintiffs' power to terminate an existing fiduciary relationship with the defendant who was charged with fraud was enough to state a cause of action under Section 10(b) and Rule 10b-5. Similarly, the ability to persuade a court to disapprove a proposed transaction is not encompassed by the concept "in connection with the purchase or sale of any security." See O'Brien, 593 F.2d at 60; cf. Gurley v. Documentation Inc., 674 F. 2d 253 (4th Cir. 1982) (plaintiffs' allegation that they were prevented from piggybacking on a public offering does not

involve sale of securities).

The plaintiff also argues that the will in fact granted her the power of approval because the defendant-trustee actually sold the trust's stock to himself. The will states: "Nothing herein contained shall be construed to prevent the individual Trustee . . . from becoming a purchaser of any of such securities . . . provided he has the approval of the income beneficiaries. . . ." (R. 17, Ex. A at 11). In this case, the closely-held corporations, and not the trustees, purchased the stock. The plaintiff correctly notes, however, the trust law recognizes that when a trustee sells trust assets to a corporation of which he owns a substantial part of the stock, he may have breached his fiduciary duty of loyalty. Nevertheless, because that breach of duty arises when the securities were sold, the

breach does not bestow on the plaintiff the power to control the sale itself, which is required for the fraud to be "in connection with the sale" of securities. In other words, the plaintiff must show that the completed transaction violated trust law; then the plaintiff may recover any gains made by the trustee at the expense of the trust. The plaintiff does not gain the power to affect the long-completed securities transaction.

This type of case is far better left to state courts. Federal securities law does not contemplate the exercise of federal jurisdiction in cases requiring resolution of purely state trust law issues as a prelude to deciding whether fraud existed in a transaction which the plaintiff, at the time, could not control. Accordingly, I respectfully dissent.

A true Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

Susan Mary NORRIS, Plaintiff,

v.

William W. WIRTZ, individually and as trustee, Arthur M. Wirtz, individually and as trustee, St. Louis Arena Corporation, a corporation, Arena Bowl, Inc., a corporation, and Wirtz Corporation, a corporation, Defendants.

No. 80 C 6836

United States District Court,
N.D. Illinois, E.D.

Sept. 13, 1982

MEMORANDUM AND ORDER

MORAN, District Judge.

This action is brought pursuant to Section 19(b) of the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78j(b) and Rule 10b-5 of the Securities and Exchange Commission promulgated thereunder. This court has subject matter jurisdiction over plaintiff's claims pursuant to Section 27 of the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. Sec 78aa, and Title 28 of the United States Judicial Code,

Section 1331, 28 U.S.C. Sec. 1331. Plaintiff Susan Norris seeks monetary relief against defendants William W. Wirtz, Arthur M. Wirtz, St. Louis Arena Corporation, Arena Bowl, Inc., and Wirtz Corporation. Before the court is defendants' motion to dismiss the complaint. Defendants seek a dismissal of the action on three grounds: first, that plaintiff lacks standing under the 1934 Act to maintain this action; second, that plaintiff's complaint fails to state a cause of action under Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder; and third, defendants are not proper party defendants.1/ For the

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1/ Defendant alleged limitations and substantive defenses as well, together with supporting documents. Because those defenses required factual development, possibly necessitating discovery by plaintiff, the court has confined its consideration to those issues defined by the allegations of the complaint. The

following reasons the court finds that Susan Norris has standing to maintain this action but grants defendants' motion to dismiss on the ground that plaintiff has failed to state a cause of action under Section 10(b) and Rule 10b-5. Therefore, the court need not reach the merits of defendants' third argument.

I. Factual Background

For purposes of this motion to dismiss the court accepts as true the following allegations of the complaint. James Norris was the father of plaintiff Susan Norris. Prior to his death on February 25, 1966 James Norris and defenant Arthur Wirtz owned a number of closely-held

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court has, however, relied upon the will of James Norris, a document relied upon by plaintiff in her complaint and from which her rights are derived, even though she did not attach it as an exhibit to her complaint.

corporations. In most of these corporations defendant Arthur Wirtz and his family owned 51% of the stock and James Norris owned 49%. Defendant Arthur Wirtz served as president of most of these corporations and James Norris served as chairman of the board; after James Norris' death defendant William Wirtz served as president and defendant Arthur Wirtz served as chairman of the board.

Two executors were appointed to administer James Norris' estate: his wife, Mary Norris, and defendant William Wirtz. His will gave certain personal property to his wife and then divided the residuary estate between a trust for Mary Norris and one for plaintiff Susan Norris. The will appointed defendant William Wirtz as trustee and defendant Arthur Wirtz as successor-trustee for both trusts. Since Mary Norris' death on January 3, 1976,

William Wirtz has acted as sole executor of the James Norris estate.

On September 21, 1967, a verified petition was filed in the Circuit Court of Cook County, Illinois, County Department, Probate Division (state court) by the co-executors of the James Norris estate, Mary Norris and William Wirtz, seeking leave on behalf of the estate to sell 4,993 shares of $100 par value common stock of St. Louis Arena Corporation, a Norris-Wirtz corporation. The proposed sale was to take the form of a repurchase and redemption of said stock by the corporation. The petition stated that it was in the best interests of the estate and its beneficiaries that the stock be repurchased by the corporation and that the redemption price had been substantiated by the corporation's last available balance sheet dated June 30, 1967. Apart from the

balance sheet no other evidence of the stock's value was submitted by William Wirtz to co-executor Mary Norris, Susan Norris, or the state court. The balance sheet listed all investments of the St. Louis Arena Corporation at their cost, not at their fair market value.

On September 21, 1967 the co-executors filed another petition in state court seeking leave on behalf of the estate to sell 1,500 shares of $50 par value common stock of Arena Bowl, Inc., another Norris-Wirtz corporation. The proposed sale was to take the form of a repurchase and redemption of the 1,500 shares of stock by the corporation. The petition stated that it was "for the best interests of the estate and the said beneficiaries thereunder" that the stock be repurchased by the corporation and that Arena Bowl, Inc. had offered to redeem the stock "at a

price representative of the valuation of the assets of the company as disclosed in the Balance Sheet submitted to the State Court." No other evidence of the stock's value was submitted by William Wirtz to Mary Norris, Susan Norris, or the state court. Susan Norris alleges that the balance sheet listed all Arena Bowl, Inc. investments at their cost, not at their fair market value.

William Wirtz knew, or would have known had he not acted recklessly, that the fair market value of the stock owned by the James Norris estate to be redeemed by the corporations was substantially greater than the price to be paid by them for said stock, that the price paid by the corporations was grossly inadequate, and that she did not know or have reason to know the fair market value of the stock. William Wirtz knowingly concealed the true

value of the stock from plaintiff, Mary Norris, and the state court, and that use of the balance sheets of the corporations had the effect of materially understating the stock's value. William Wirtz knowingly concealed these facts so that the state court would approve the stock redemptions. By these acts William Wirtz was engaged in a scheme to defraud, and did defraud Susan Norris, in violation of Section 10(b) of the 1934 Act and Rule 10b-5. His fraudulent actions were also taken on behalf and for the benefit of the defendant corporations.

As a result of William Wirtz' failure to disclose the true value of the corporations' assets and thus the true value of their stock to the state court, and his representations that the sale of said stock was in the best interests of the estate, the state court approved the

redemptions of stock by the St. Louis Arena Corporation and Arena Bowl, Inc. If Mary Norris or the state court had been made aware of the true value of the corporations' assets and stock, they would not have approved the sale, and if Susan Norris had known she would have requested the state court to disapprove the sales. Subsequent to the state court's approval the stock of St. Louis Arena Corporation and Arena Bowl, Inc. was redeemed for $2,600,000 and $86,265 respectively, which were unfair prices.

Arthur Wirtz agreed with William Wirtz that the stock should be redeemed, agreed on the steps that were taken to carry out the redemptions, and substantially assisted William Wirtz and the corporations in carrying out the redemption and scheme to defraud Susan Norris. Arthur Wirtz and William Wirtz controlled the

actions of the corporations in connection with the redemptions and are therefore liable under Section 20(a) of the 1934 Act, 15 U.S.C. Sec. 78t.

On September 27, 1968 Mary Norris and William Wirtz filed a third petition in state court seeking leave on behalf of the estate to sell 8,625 shares of stock in Judge & Dolph, Ltd., a wholesale liquor company. The petition stated that the Wirtz Corporation owned more than 75% of the outstanding stock of the corporation and that it was to be "liquidated and dissolved in due course." The petition further stated that the Wirtz Corporation had made offers to all the other shareholders of Judge & Dolph, Ltd. to purchase their stock for $20 a share. Thus, the price to be paid by the Wirtz Corporation for the stock owned by the James Norris estate would be $172,500. William Wirtz

told the state court that his price was "a fair and just price" and was in the "best interests" of the James Norris estate. No documentation, affidavits or other factual materials were submitted to the state court to justify this statement.

Despite William Wirtz' representation to her, Mary Norris, and the state, that Judge & Dolph, Ltd. was "to be liquidated and dissolved in due course," it is still owned and operated by the Wirtz family and is one of the largest wholesale liquor companies in the Chicago metropolitan area. The amount paid for the stock, $172,500, was grossly inadequate--the same shares of stock were valued at $282,000 as of the date of James Norris' death in a settlement arrived at with the Internal Revenue Service. William Wirtz knew or would have known had he not acted recklessly, that the price to be paid by the

Wirtz Corporation for the stock was grossly inadequate, that there was no factual basis for concluding that the price was "fair and just," and that Judge & Dolph, Ltd. was not going to be "liquidated and dissolved in due course." William Wirtz knowingly concealed these facts so that the state court would approve, as it subsequently did, the sale of said stock to the Wirtz Corporation.

By knowingly undervaluing the true worth of the stock and by concealing this worth from plaintiff, Mary Norris, and the state court, William Wirtz engaged in a scheme to defraud and did defraud Susan Norris, in violation of Section 10(b) of the 1934 Act and Rule 10b-5. His fraudulent actions in connection with the sale of said stock were also taken on behalf and for the benefit of the Wirtz Corporation. As with the previous transactions,

Susan Norris alleges that the sale would not have been approved by the state court if the true facts had been made known to it, and that Arthur Wirtz substantially assisted William Wirtz in this scheme to defraud her.

As a result of the above-described transactions Susan Norris seeks damages in the amount equal to the difference between the fair market value of the stock as of the dates such stock was sold to the three corporations and the price received by her trust as a result of said sales, plus the interest thereon from the sale dates until the date of judgment. In addition, she seeks reasonable attorneys' fees and costs.

II. Motion to Dismiss

A. Standing

In Birnbaum v. Newport Steel

Corp., F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956, 72 S.Ct. 1051, 96 L.Ed. 1356 (1952), the court held that a plaintiff must be a purchaser or seller of securities to bring a private action for damages under Section 10(b)2/ or Rule 10b-5.3/

2/ Section 10(b) of the 1934 Act provides in relevant part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--
>
> * * * * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. Sec. 78j.

The Supreme Court adopted the Birnbaum rule in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975). It is not disputed

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3/ Promulgated pursuant to Sec. 10(b) of the 1934 Act, Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange:
>
> (a) To employ any device, scheme, or artifice to defraud.
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. Sec. 240, 10b-5.

that Susan Norris herself did not sell the stock from her father's estate to the three defendant corporations. The three sales were made by the co-executors of the James Norris estate: Mary Norris and William Wirtz. Apart from certain personal property given to Mary Norris, James Norris divided the residuary estate between Mary Norris and Susan Norris through testamentary trusts. Thus, Susan Norris was, as a testamentary trust beneficiary, a principal beneficiary of her father's estate.

In Heyman v. Heyman, 356 F.Supp. 958 (S.D.N.Y. 1973), plaintiff was the beneficiary of a residuary trust created by her father's will. Plaintiff's trust was funded with the proceeds from the redemption of stock which her father had owned in the defendant corporation. Plaintiff claimed that the executors of her father's

estate had redeemed the stock to the defendant corporation at less than its fair market value. The Heyman court held that plaintiff had standing to sue the executors of her father's estate and the defendant corporation. The court reasoned that although the plaintiff was not the seller she was the one who immediately stood to gain or lose and it was for her benefit that the sale was made. The court stated that plaintiff was the beneficiary of the sale and conferring standing on her did not violate the purpose of Birnbaum, which was to foreclose suits under Section 10(b) against corporate mismanagement unrelated to securities transactions.4/

4/ See also James v. Gerber Products Co., 483 F.2d 944, 948 (6th Cir. 1973) as beneficiary of a trust from which shares of stock were sold, plaintiff had standing to assert a 10b-5 claim since she was the person who was to be benefitted by the sale and thus she had the interests of a de facto seller); Selzer v. Bank of

Although Heyman, supra, was decided prior to the Supreme Court's adoption of the Birnbaum rule, federal courts in decisions subsequent to that adoption have relied on Heyman in conferring standing on plaintiffs who are beneficiares of a sale. For example, in Hackford v. First Security Bank of Utah, 521 F.Supp. 541 (D.Utah 1981), the court found that:

> While the trust beneficiaries did not perform the mechanics of the sale of their stock, they were not the bystanders contemplated by Blue Chip. They are separate from the public-at-large. It was stock in which they had a beneficial interest which was sold. If any fraud occurred as to them, it was they who would feel the impact, not the trustee "seller".

Id. at 549. See e.g., Kirshner v. United States, 603 F.2d 234, 240 (2d Cir.1978),

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Bermuda, Ltd., 385 F.Supp. 415, 419 (S.D.N.Y. 1974) (plaintiff as beneficiary of a trust had standing to assert a 10b-5 claim against a trustee where the challenged actions were not arm's-length transactions).

cert. denied, 442 U.S. 909, 99 S.Ct. 2821, 61 L.Ed.2d 274 (1979); Klamberg v. Roth, 425 F.Supp. 440, 442 (S.D.N.Y. 1976). This conclusion has not been foreclosed in this circuit since the Court of Appeals for the Seventh Circuit, in O'Brien v. Continental Illinois National Bank & Trust Company of Chicago, 593 F.2d 54, 59 (7th Cir. 1979), stated that it was "unable to say categorically that plaintiffs, on whose behalf Continental bought, were not in any sense purchasers of the securities."

In the instant case Susan Norris would be the person who would feel the impact if any fraud occurred in the stock sales to the defendant corporations. As beneficiary of a residuary trust funded by assets of the James Norris estate, the sale of such assets for any unreasonably low price would directly affect the

plaintiff (and also her mother) and not the seller, executor-trustee William Wirtz.

Defendants contend that Susan Norris, as the beneficiary of an unfunded trust, is too far removed from the transactions to have standing to maintain this action. They argue that Susan Norris had no rights, interest or connection with respect to said transactions since the sales were effected by the executors of the estate prior to the funding of the residuary trusts and these estate assets could have possibly become property of plaintiff's trust only after settlement of the estate and then only if property remained after payment of debts and was allocated by the trustee to plaintiff's trust (as distinguished from her mother's trust). Alternatively, defendants contend that assuming arguendo the transactions

were effected by William Wirtz, as trustee, for or on behalf of her trust, Susan Norris would still be without standing to institute this action. This court cannot agree with these contentions.

In Heyman, supra, the redemption of stock was effected by the executors of plaintiff's father's estate and plaintiff's trust was then funded with the proceeds from this redemption. Moreover, plaintiff's father's will divided the residuary estate into two equal portions, to be held in separate trusts for plaintiff and her brother, defendant Michael Heyman. Despite these facts the Heyman court conferred standing on the plaintiff since she was a beneficiary of the sale and the one who would be injured by any failure to receive fair market value for the stock. This court agrees with the reasoning of the Heyman court and reaches

the same conclusion on similar facts in the present case. On the basis of hindsight now available to him, William Wirtz cannot now argue that he would have decided to allocate the stock or the proceeds from its sale to Mary Norris' rather than plaintiff's trust. Moreover, a failure to receive fair market value for the estate affects the net worth of the estate and, accordingly, affects the value of the estate assets which would fund Susan Norris' trust.

Defendants rely on the following case authority to support their proposition that a sale by a trustee on behalf of a plaintiff's trust does not confer standing on that plaintiff to maintain a 10b-5 action against the trustee. See e.g., Fitzsimmons v. Old Security Insurance Company, CCH Fed. Sec. L. Rep. Par. 96,236 (N.D. Ill. 1977); Lincoln National Bank v.

Lampe, 414 F.Supp. 1270 (N.D. Ill. 1976); Rippey v. Denver United States National Bank, 260 F.Supp. 704 (D. Colo. 1966). These cases rely on Blue Chip, supra, in holding that standing to maintain a 10b-5 action is limited to actual purchasers or sellers. There is no controlling case authority on this question since neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has yet decided whether beneficiaries of a sale in Susan Norris' position have standing to maintain a 10b-5 action. Therefore, this court "in unwilling to extend, or apply, as the case may be, the holding of Blue Chip to deny plaintiff standing in this case." Hackford, supra at 549. See also Kirshner and Klamberg, supra.

B. Cause of Action

Having recognized that Susan

Norris has standing, the court must now decide whether she has stated a cause of action under Section 10(b) and Rule 10b-5. Both proscribe fraud "in connection with the purchase or sale" of securities.

In approaching that issue, the court is not unmindful of the recent history of federal securities fraud claims and implied rights of action in the Supreme Court. While this court has determined that plaintiff has standing to litigate here if she has a federal claim, it is also aware that the courts have been increasingly inhospitable to sweeping within the ambit of federal securities law claims only marginally related to purchase-and-sale transactions as commonly understood.

Here the claim relates to the probate court approval in 1966, 1967 and 1968 of the sale of assets of an estate then

subject to probate. The approval was sought and obtained by the co-executors, defendant William W. Wirtz and plaintiff's mother, Mary Norris. By the decedent's will the residuary estate, of which those assets were a part, was to be divided between the testamentary trusts. During the administration of the estate, however, the co-executors had the same powers as the succeeding testamentary trustee to sell assets. Plaintiff claims that fiduciary Wirtz misled her, his co-executor and the court in valuing those assets. Such are the stuff of state chancery actions and, indeed, plaintiff contemporaneously with this action filed an action in state court.

Plaintiff contends, however, that her approval of the sale was required, and she alleges that in obtaining that approval defendant Wirtz misrepresented the asset

values by his nondisclosure of their market, as distinguished from book, value. Accordingly, she contends, she was fraudulently misled in making her investment decisions respecting the sale of securities.

If the provisions of the instrument upon which she relies were as she contends, that contention would have considerable, although not necessarily conclusive, force. The close nexus between plaintiff's claim and the traditional state role in the administration of estates brings into question whether her claim is within the rights implied under federal securities laws. See Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977). But if the alleged nondisclosures were material to a required investment decision, then, arguably, the 10b-5 claim can

be maintained. See O'Brien v. Continental Illinois National Bank & Trust Co., supra.

In O'Brien, supra, plaintiffs were the respective trustees of nine separate trust funds. In each case plaintiffs had entered into an agreement with the defendant under which trust funds were turned over to the defendant for investment. Defendant was given the responsibility for making such investments in its sole discretion as it saw fit, subject to a fiduciary duty of due care. Plaintiffs had power to terminate the agreements at will but had no right to receive notice of or to be consulted about proposed investments and had no right to veto investment decisions. Id. at 57. In concluding that the failure to disclose certain facts to the plaintiffs did not occur "in connection with" the purchase of securities, the Court of Appeals for the Seventh Circuit

said:

> The important point for our analysis is the decision to which the nondisclosure related. If that decision is whether to purchase or sell a security, the nondisclosure is in connection with the purchase or sale. Here, however, that decision was not whether Continental [defendant] should buy or sell the securities in question, for the terms of the trust and agency agreements made that decision solely Continental's and plaintiffs had no voice in it. The decision to which the nondisclosure related was whether plaintiffs should terminate the trust or agency agreements or, perhaps, take some action against Continental. As Judge Flaum correctly stated in his memorandum of decision granting the motions to dismiss the federal claims,
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> > [T]here was no investment decision to be made by plaintiffs and no such decisions were affected by any lack of information on plaintiffs' part. The "market transactions" were pure; the trust relationships were not. Rule 10b-5, however, protects the former and not the latter.

Id. at 60.

But the instrument upon which she relies does not require her approval. The will of James Norris gave the executors sole discretion to sell estate property by

the following statement: ". . . I hereby give to them as such executors full power and authority at any time or times to sell, mortgage, pledge, exchange or otherwise deal with or dispose of the property comprising my estate upon such terms as they shall deem best. . . ." Since plaintiff had no voice in the decision to sell the stock in the three defendant corporations, any nondisclosure of material facts by defendants does not meet the "in connection with a purchase or sale" requirement of Section 10(b) and Rule 10b-5.

Susan Norris contends, however, that William Wirtz had severely restricted authority to purchase stock by the following terms in the will of James Norris: "Nothing herein conained shall be construed to prevent the individual trustee . . . from becoming a purchaser of

any of such securities from any available source whatsoever provided he has the approval of the income beneficiaries or their legal representatives with respect to such purchase." This argument fails, however, since William Wirtz was not purchasing the stock but, rather, the closely-held corporations were the purchasers.

Plaintiff argues that the testator, in referring to the individual trustee, meant any closely-held corporation in which he held an interest. The will plainly discloses otherwise. James Norris well recognized that his assets in large measure were interests in closely-held corporations shared with Wirtz family members. He sanctioned retention of those assets, authorized his trustee to be active in management, granted their shareholders a second right of refusal,

and provided a mechanism for valuing the shares for sale in the absence of a third party offer. The carefully spelled out procedures for disposing of shares in the closely-held corporations are contrary to the suggestion that "individual trustee" was somehow shorthand for "closely-held corporation."

For the reasons stated, the motion to dismiss is granted.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

December 22, 1983

Before

Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Max Rosenn, Senior Circuit Judge*

SUSAN MARY NORRIS,	)
	)
Plaintiff-Appellant,	)
	)
NO. 82-2644 v.	)
	)
WILLIAM W. WIRTZ, individually and as trustee, ARTHUR W. WIRTZ, individually and as trustee, ST. LOUIS ARENA CORPORATION, a corporation, ARENA BOWL, INC., a corporation, and WIRTZ CORPORATION, a corporation,	)
	)
Defendants-Appellees.	)

Appeal from the United States
District Court for the
Northern District of Illinois,
Eastern Division

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* The Honorable Max Rosenn, Senior Judge of the United States Court of Appeals for the Third Circuit, is sitting by designation.

No. 80 C 6836
James B. Moran, Judge.

ORDER

The original panel opinion in this case was issued on October 14, 1983. On further consideration after a petition for rehearing was filed, we amend the slip opinion as follows:**

1) On page seven of the slip opinion, after the second sentence in the first full paragraph (ending with ". . . are there are in substance.") and before the sixth sentence in that same paragraph (beginning with "The district court reasoned . . . ."), insert and susbstitute

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** Judge Bauer respectfully dissents from the portions of this order that amend the majority opinion and would vote to grant rehearing by the panel. Judge Bauer has amended his original dissent to respond to the majority's amendments, and that amendment is included in this Order.

the following:

> James Norris' will states that the co-executors are to have full power to dispose of the estate's assets and to settle claims against it in the ordinary course of administration, but with an eye, of course, toward fulfilling the primary testamentary intention of funding plaintiff's and plaintiff's mother's trusts from the residue of the estate. The will provisions establishing plaintiff's trust provide that the trustee is generally to have full and unquestioned power to make investment decisions regarding the trust property. But the will does give James' Norris' daughter, plaintiff here, the power to approve the sale of any stock in the closely-held corporations beneficially owned by plaintiff when the purchaser is the individual trustee. The will states: "Nothing herein contained shall be construed to prevent the individual Trustee . . . from becoming a purchaser of any such securities from any available source whatsoever provided he has the approval of the income beneficiaries . . . with respect to such purchase." (R. 17, Ex. A at 11) (emphasis added).

2) On page seven of the slip opinion, at the first sentence of the second full paragraph on page eight of the slip opinion (beginning "The board proscription . . . ."), insert and substitute the

following paragraph:

> The will provision is aimed at preventing any self-dealing transaction by the individual trustee whereby the trustee pruchases stock of the closely-held corporations held in trust or by the estate without the trust-beneficiary's prior approval. The provision would appear to apply with equal force to a purchase by the individual trustee made from the estate before the trust is funded, since the provision is intended to restrict any self-dealing by the individual trustee that could harm the trust-beneficiaries.1/ It would be anomalous to apply the provision to restrict purchases by the individual trustee only from the trust assets and not the estate assets; in either situation, the trust-beneficiary is the beneficial owner of the securities, since the securities held by the estate are to become the trust property once routine estate administration hs occurred. In this case, plaintiff was clearly the beneficial owner of the securities held by the estate and had the authority to disapprove their sale to an individual trustee. The only question regarding the applicability of the will provision here, therefore, is whether

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1/ We also note that the restrictive provision applies to purchases of "any of such securities," which refers to all the closely-held corporation stock owned by the decedent that became assets in the estate. (R. 17, Ex. A at 10).

defendant William Wirtz, as individual trustee, can be considered to be the purchaser of the securities even though the securities were nominally purchased by the closely-held corporations.

We believe that the purchases by the close corporations controlled by defendants William and Arthur Wirtz were in fact, or virtually, a purchase by defendant-trustee William Wirtz, so that plaintiff's prior approval of the sale was essential under the will. We think that the only reasonable interpretation of the testamentary provision is that it was intended to prevent any self-dealing transaction, regardless of the form, in which the individual trustee purchased securities beneficially owned by the plaintiff. Certainly, the Wirtzes believed the testamentary provision to be applicable. Before each of the securities sales to the close corporations controlled by defendants, defendant William Wirtz, allegedly assisted by defendant Arthur Wirtz, solicited plaintiff's approval. Thus, although defendant William Wirtz sold the securities as co-executor, the will provision applied to the sale of the securities to him by virtue of his role as trustee-purchaser, because the purchases were made by William Wirtz and his father through their fully controlled corporations. Although the will provision could have been drafted more clearly, the testator obviously inserted it to give his daughter a say about the handling of the assets bequeathed to her for her benefit and

> use if the Wirtzes, who were appointed trustee and successor trustee, contemplated any self-dealing. The use of the close corporations controlled by the Wirtzes to complete the transactions here can neither conceal nor excuse the self-dealing that occurred. It was precisely to prevent this self-dealing that the testator gave his daughter the ultimate voice in making the investment decisions "in connection with" such transactions.

On page ten of the slip opinion (Bauer, J., dissenting), add the following sentence after the last sentence of the incomplete paragraph (ending ". . . affect the long-completed securities transaction.") and before the final paragraph (beginning "This type of case . . . ."):

> Additionally, I cannot subscribe to the majority's broad interpretation of the will as applying to all instances of apparent self-dealing.

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by defendants-appellees, no judge in active

service*** has requested a vote thereon, and a majority of the judges on the original panel have voted to deny rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

*** Chief Judge Walter J. Cummings disqualified himself from any consideration of the petition for rehearing en banc filed in this matter.

LAST WILL AND TESTAMENT

OF

JAMES D. NORRIS

I, JAMES D. NORRIS, of Chicago, Illinois, being of sound and disposing mind and memory, do make, publish and declare this to be my Last Will and Testament, hereby revoking and annulling any and all former Wills be [sic] me made.

FIRST: I order and direct my Executors hereinafter named, to pay all of the legal obligations of my estate as soon after my death as practicable. I also direct my Executors to pay or make deposits on account of all inheritance and estate taxes (including deficiencies, interest and penalties thereon) becoming due by reason of my death, all of which payments shall be paid out of my residuary estate before distribution thereof, if possible, and the same shall be treated as

expenses and costs of administering my estate. My Executor shall have no duty or obligation to obtain reimbursement for any such tax paid by him even though on proceeds of insurance or other property not passing under this Will.

SECOND: I give and bequeath to my wife, MARY NORRIS, all of the household furniture and furnishings, automobiles, musical instruments, books, pictures, jewelry, watches, silverware, wearing apparel, family stores and all other articles of household or personal use or ornament, of which I may die possessed, and in the event that she shall not survive me, then I give all of said articles to my daughter, SUSAN MARY NORRIS, if she shall survive me, provided, however, that if she shall be a minor, the Trustee, hereinafter named, shall receive and hold such goods and chattels for the

benefit of my said daughter and deliver them to her either before or at the date of attainment of her majority; and provided, further, that the Trustee, in his discretion, may sell such personalty or any part thereof, and add the proceeds to the part of the principal of the Trust Estate held for her benefit.

THIRD: All the rest, residue and remainder of the property, real, personal or mixed, of whatsoever character and wheresoever situate of which I may die seized or possessed, or which I may own or have any interest in at the time of my death, including any lapsed legacies or devises hereunder, but excluding any property over which I may have a power of appointment, which power or powers I hereby expressly decline to exercise, I give, devise, and bequeath to WILLIAM W. WIRTZ, as Trustee, to be held, managed,

and distributed upon the terms and conditions hereinafter set forth.

A. In order to assure my estate of the maximum marital deduction permitted under the federal estate tax provisions of the Internal Revenue Code, if my said wife, MARY NORRIS, shall survive me, the Trustee shall immediately set aside out of the Trust Estate as a separate trust (hereinafter referred to as "Trust A") so much thereof as is equal in value to the amount by which the maximum marital deduction available to my estate exceeds the aggregate value of all interests in property which pass or have passed from me to my said wife, except under the trust created by this Paragraph A, and otherwise qualify for the marital deduction. The final determinations made in the proceedings to fix the liability of my estate for federal estate tax shall be conclusive

as to the total value of Trust A and as to the value of each item of property allocated thereto. The decision of the Trustee as to the property to be allocated to Trust A shall be final and conclusive and binding upon all beneficiaries, provided only that (1) there may not be allocated to Trust A any property with respect to which no marital deduction would be allowed if such property had passed from me to my said wife free of trust; and (2) the property so allocated shall have an aggregate fair market value fairly representative of the appreciation or depreciation in the value to the date, or dates, of each distribution of all property available for distribution. The marital deduction referred to herein is the deduction allowed in determining the federal estate tax for property passing to a surviving spouse under the Internal

Revenue Code in effect at the time of my death (presently Section 2056 thereof). The Trustee shall hold, manage, invest and distribute the income and principal of Trust A upon the following terms and conditions:

A-1. The Trustee shall pay the entire net income Trust A to my said wife in quarterly or more frequent installment commencing from the date of my death and continuing so long as she shall live.

A-2. The Trustee shall also pay to my said wife as much of the prinicpal of Trust A as, in the sole judgment of the Trustee, shall be deemed to be necessary or advisable to assure her care, comfort, support, maintenance and medical attention (including hospital and institutional care).

A-3. Upon the death of my said wife, the Trustee shall pay and distribute the

entire principal of Trust A and any accrued, accumulated or unpaid net income thereof which would have been payable to my said wife had she lived, as she shall appoint by a provision of her Last Will and Testament, specifically referring to this power of appointment (including the power in her to appoint all thereof to her estate and free of trust). The Trustee shall add all of the principal of Trust A not otherwise appointed by her to the principal of Trust B hereinafter created and shall add any accrued, accumulated or unpaid net income not otherwise appointed by her to the income of Trust B, to be treated as a part thereof and subject to all of the terms, trusts and conditions then and thereafter pertaining thereto.

B. The balance of the Trust Estate, or all thereof, if my said wife shall not survive me, shall be held as a separate

trust (hereinafter for convenience referred to as "Trust B") and be managed, invested and distributed upon the following terms and conditions:

B-1. In the event MRS. A. S. MATTHEWS, now residing at Toronto, Canada, survives me, I hereby direct my Trustee to pay to her during her lifetime income from my estate in the amount of Three Hundred Dollars ($300.00) per month.

B-2. Subject to the provisions of B-1 of this article, commencing with the date of my death, the Trustee shall apply all of the remaining net income of Trust B for the maintenance, support, education and medical attention of my daughter, SUSAN MARY NORRIS, until she attains the age of twenty-one (21) or until her death, whichever event shall first occur. In the event my said daughter shall predecease me or shall die prior to the complete

distribution of Trust B to her as hereinafter provided, my Trustee shall withhold and administer the assets of Trust B as then constituted for the benefit of the lawful living descendants of my daughter, SUSAN MARY NORRIS. Any income in excess of that paid or applied by my Trustee for the benefit of my said daughter as hereinbefore provided until she attains the age of twenty-one (21) years shall be added to the principal at the end of each calendar year and invested in such manner as may be determined by my Trustee in his best judgment.

B-3. Upon my daughter, SUSAN MARY NORRIS, attaining the age of twenty-one (21) years, the entire net income from Trust B shall be distributed and paid over to her in convenient installment not less than quarterly until her death or the distribution of the Trust as hereinafter

provided whichever event shall first occur. If during this period the monthly installments of income distributed shall be less than Two Thousand Dollars ($2,0000.00) monthly, then my Trustee shall use so much of the principal of Trust B as is necessary to assure payment to my said daughter of the minimum sum of Two Thousand Dollars ($2,000.00) monthly.

B-4. My daughter, SUSAN MARY NORRIS, shall have the right to withdraw the principal of Trust B at any time and from time to time after its creation and after she shall have attained the age of forty (40) years upon the following terms and conditions:

(a) not more than one-half (1/2) of such Trust may be withdrawn before my daughter shall have attained the age of fifty (50) years;

(b) all or any remaining part of such Trust may be withdrawn after my daughter shall have attained the age of fifty (50) years.

B-5. Upon the death of my daughter, SUSAN MARY NORRIS, for whose primary benefit Trust B is then being held by the Trustee in trust hereunder, the Trustee shall pay and distribute all of such then remaining portion of Trust B, to the extent to which the same shall not have vested in my daughter, to her then living lawful descendants, per stirpes [sic], or if no lawful descendants of my daughter shall then be living, such remaining portion of Trust B shall be distributed in the following manner:

1. My Trustee shall pay and distribute to the following persons who shall then be living the respective sums designated:

(a) Valerie A. Kalas,
sister of my wife,
Mary Norris, $100,000

(b) Marilyn V. Kalas, daughter of the said Valeria [sic] A. Kalas, 25,000

(c) Geraldine McLaughlin, daughter of the said Valerie A. Kalas, 25,000

(d) William E. McLaughlin, son of the said Geraldine McLaughlin, 25,000

(e) Carola A. McLaughlin, daughter of the said Geraldine McLaughlin, 25,000

(f) Mary C. McLaughlin, daughter of the said Geraldine McLaughlin, 25,000

2. The balance of said Trust B as

then constituted shall be distributed as hereinafter provided:

(a) One-half (1/2) part thereof to be retained in trust, the income of which shall be paid by my Trustee to the then survivors or survivor of the said Valerie A. Kalas, Marilyn V. Kalas and Geraldine McLaughlin during their respective lifetimes, and upon the death of the last to die of the said income beneficiaries, the remaining principal and accrued income thereof shall be distributed to the following trusts hereinafter created in equal shares.

(b) The remaining portion of said balance of Trust B shall be distributed as follows:

(i) One-half (1/2) part thereof to the Eastern Long Island Hospital Association, Greenport, Long Island, New York, to be held in trust to establish and create the JAMES D. NORRIS MEMORIAL, the income of which trust shall be used for its general purposes and the principal thereof to be held in perpetuity; and

(ii) One-half (1/2) part thereof to the Presbyterian Church, Mattituck, Long Island, New York, to be held in trust to establish the JAMES D. NORRIS MEMORIAL, the income from which trust shall be used for its general purposes and the principal thereof to be held in perpetuity.

B-6. If a separate share shall be set aside for the benefit of the lawful descendants of my daughter, SUSAN MARY NORRIS, then upon the setting aside of such share, the Trustee shall pay and distribute the same to such lawful descendants, per stirpes; provided, however, that if under this or the preceding Paragraph B-5, any portion of the principal of Trust B shall become payable to a descendant or heir who is then less than twenty-one (21) years of age, such portion shall immediately vest in such descendant or heir, but distribution thereof shall be

postponed by the Trustee until such descendant attains the age of twenty-one (21) years, and, in the meantime, the Trustee shall pay so much of the net income of such portion to such descendant or heir as may be necessary for his or her support, maintenance, education and medical attention, and any income in excess of that paid or applied by my Trustee for the benefit of such descendant or heir until he or she attains the age of twenty-one (21) years shall be added to the principal of the share of such descendant or heir.

B-7. Whenever and as often as any beneficiary of Trust B, or of any separate share thereof, to whom payments are herein directed to be made shall be under a legal disability, or in the sole judgment of the Trustee, shall otherwise be unable to apply such payments to his or her own best

interst and advantage -

(a) the Trustee may make all or any portion of such payments in any one or more of the following ways:

(1) directly to such beneficiary;

(2) to the legal guardian or conservator of such beneficiary;

(3) to a relative of such beneficiary to be expended by such relative for the benefit of such beneficiary; or

(4) by expending the same for the benefit of said beneficiary;

and the decision of the Trustee in each such case shall be final and binding upon all beneficiaries hereunder.

B-8. If at any time or from time to time, in the judgment of the Trustee, the aggregate of the income payable to a beneficiary of Trust B and all other resources known to the Trustee to be readily available to such beneficiary

shall be insufficient to provide for his or her suitable care, comfort, support, maintenance, education and medical attention (including hospital and institutional care), there may be paid to or applied for the use and benefit of such beneficiary for such purpose, in the uncontrolled discretion of the Trustee, a portion of the principal of Trust B then held for the benefit of such beneficiary.

FOURTH: In addition to any authority given or conferred by law, and subject only to the duty to apply the proceeds and avails of the trust property to the pruposes herein specified, the Trustee of Trust B may perform every act in the management of the trust estate and the several shares thereof (including any share vested in a person under the age of twenty-one (21) years which individuals may perform in the management of like

property owned by them free of any trust, including by way of illustration the powers hereinafter set forth, except to the extent otherwise limited under the terms of my Will:

A-1. The Trustee shall have full power to invest and reinvest the trust property in such stocks, bonds, or other income-producing securities or property, real or personal, as he deems advisable; to lease (for any period of time even though extending beyond the term of the trust), sell, exchange or pledge any or all of the trust property as he deems proper; to register securities or other property in the name of a nominee without qualification or restriction; to employ attorneys, auditors and investment advisors, and to act without independent investigation upon their recommendations, and to employ depositaries, proxies and

agents, with or without discretionary powers; to settle, compromise or abandon any and all claims and demands as the Trustee deems best; to make divisions and distributions provided for in undivided interests or in kind, or party [sic] in cash and partly in kind, at valuations determined by the Trustee, and to sell any property for such purposes as the Trustee deems advisable. The Trustee may vote either in person or by general or limited proxy any corporate securities for any purpose. The Trustee also is authorized to determine how all receipts and disbursements, including the Trustee's compensation, shall be credited, charged or apportioned as between income and principal. The Trustee may continue to hold any property or securities originally constituting the trust property or at any time thereafter added to the trust by any

person, although not of a type or quality nor constituting a diversification considered proper for trust investments. The Trustee may hold the seveal trusts or shares as a common fund, dividing the income proportionately among them, assign undivided interests to the several trusts or shares and make joint investments of the funds belonging to them. The Trustee shall be entitled to receive a fair and just compensation for his services in the management and protection of the trust property.

A-2. My Trustee is expressly authorized to retain as an investment of the Trusts herein created, but without limitation thereof, all the securities of Consolidated Enterprises, Inc., N & W Corporation and any or all other closely held corporations, trusts or partnerships, ARTHUR M. WIRTZ and/or members of his

family and myself and/or members of my family, have joint ownership or control. I further authorize my Trustee in his best judgment and discretion to liquidate such securities whenever it is deemed to be to the best interest of the trusts created hereunder and the decision and judgment of my said Trustee shall be conclusive, binding and final and no present or future income beneficiary shall question the decision or good faith of such Trustee. I fully appreciate and recognize that discretionary retention of the securities of such closely held corporations and an orderly liquidation of same would be to the best interests of ARTHUR M. WIRTZ and his family members as well as to my estate and the trusts created hereunder, for which reasons the Trustee nominated by me has accordingly been granted the authorizations, discretions, and powers herein

provided. Pending sale or final distribution of said securities or liquidation of such closely held corporations the Trustee shall have the following authorities and discretions in addition to the general grant of authority and discretion elsewhere herein given to him;

(a) to participate in the management of the Corporation;

(b) to supervise the conduct of the Corporation's business;

(c) to extend credit to the Corporation from the banking department of the (corporate) Trustee without in any way increasing, limiting or otherwise effecting [sic] its duties, responsibilities and liabilities as Trustee;

to such extent and in such manner as the Trustee shall from time to time deem necessary or advisable to protect the investment of the trusts herein created and contribute to the best interest and welfare of the beneficiaries thereof.

Nothing herein contained shall be

construed to prevent the individual Trustee from being employed by any of said closely held corporations at a salary commensurate with the value of services on behalf of the herein trusts, nor to prevent him from becoming a purchaser of any of such securities from any available source whatsoever provided he has the approval of the income beneficiaries or their legal representatives with respect to such purchase.

In the event my Trustee should elect to sell any part of or my entire interest in any one or more of the aforementioned closely held corporations, and in each instance and at such a time as an offer is received from a third party with respect to any part or all of said interests, I hereby direct that my Trustee give and grant unto that particular corporation, the stock of which is being sold, the

first opportunity to purchase such corporate stock. If such corporation does not exercise its prior privilege of purchase on the terms of sale offered, the Trustee shall next grant to the shareholders of that particular corporation the first opportunity to purchase the corporate stock on the terms and conditions provided in the said offer to purchase. If neither the corporation nor the shareholders elect to purchase such stock, the Trustee shall be fully authorized to sell my interest in the particular closely held corporation to the third party offerer.

In the event my Trustee shall from time to time elect to so sell and dispose of any part or all of my interests in any one or more of such closely held corporations and such trustee has been unable to secure an offer to purchase from an independent third party, the Trustee shall

notify the income beneficiaries or their legal representatives, as the case may be, to advise the Trustee in writing as to the purchase price acceptable to such income beneficiaries or their legal representatives (sometimes hereinafter referred to as "parties") with respect to the stock in question, or alternately, to designate in writing the identity of an appraisor to be retained by the Trustee for the purpose of determining a fair and reasonable market price. In the latter event, upon such determination by the designated appraiser the Trustee shall be authorized to sell said stock at the appraised value in the manner hereinafter provided. My Trustee shall rely upon a wavier in writing of the right of the parties to so participate, and if any one or more of such parties shall advise or designate in writing within 20 days after the mailing to such

parties of a written notice setting forth requested directions, my Trustee may rely on the written advice of any one or more of the parties responding as above provided. Failure of all the parties to reply shall be construed by my Trustee as a waiver of right to act and my Trustee shall, in his discretion and judgment, make his determination of the purchase price without any accounting or liability whatsoever to such present or future beneficiaries or their legal representatives.

Upon determination of the appraised valuation or purchase price, the corporation (or the shareholders thereof if the corporation does not elect to purchase the stock which is being sold) shall have 90 days to elect to purchase such securities and if within that period an election to purchase is made then I direct my Trustee

to effect a purchase arrangement which will not be unreasonably burdensome on the corporation or its shareholders and the decision and judgment of the Trustee with respect to the terms of sale shall be conclusive and final and shall not be subject to question by present or future income beneficiaries.

If neither the closely held corporation in question nor the shareholders of the corporation elect to purchase the said securities at the purchase price determined by the income beneficiaries, their legal representatives, or by the Trsutee, or alternately, at the appraised value as hereinabove provided, and should my Trustee elect at a subsequent date to dispose of any or all of such securities of anyone [sic] or more closely held corporation [sic] at a purchase price less than the previously determined price, I

further direct that the particular closely held corporation (stock of which is being sold) or the shareholders of same, as the case may be, shall nevertheless have the first right of refusal to so purchase the securities in question at the lesser price under the terms and conditions as decided by the Trustee in the best interests of the Trust Estate, but yet not unreasonably burdensome on the purchaser.

The decision and judgment of my Trustee to retain my aforesaid interest, to partially liquidate, or to sell and dispose of my interest in its entirety, shall be final, binding and conclusive, and my Trustee shall not be accountable to any present or future income beneficiaries for his action in the performance and the exercise of the powers and authorizations herein conferred upon such Trustee.

No person or corporation dealing with

the Trustee shall be required to inquire into the terms of this trust nor see that they are complied with.

FIFTH: If and as often as the Trustee deems the same advantageous to any trust created hereunder or the beneficiaries thereof, he or it may appoint any bank or trust company, wherever situate, as Substitute Trustee. The Substitute Trustee appointed under the terms hereof shall have such titles, powers, duties, rights and discretions as are granted to it by the Trustee. The Trustee may at any time remove a Substitute Trustee appointed by him or it and may alter any titles, powers, duties, rights and discretions which have theretofore been granted to the Substitute Trustee. Any Substitute Trustee appointed hereunder may resign by a writing delivered to the Trustee. Upon the removal or resignation of any Substi-

tute Trustee, the Trustee may appoint any other bank or trust company, wherever situate, as Substitute Trustee under the provisions hereof. Upon its resignation or removal, a Substitute Trustee shall make transfer and delivery of all trust assets in its possession as the Trustee may direct, and the approval of its accounts by the Trustee shall be a full release and discharge of such Substitute Trustee, conclusive and binding upon all of the beneficiaries hereunder. The Trustee may exercise the power granted hereunder as to all of the trust assets or as to only a portion of the trust assets. The Trustee shall at all times be entitled to reasonable compensation for his or its services. The powers herein vested in the Trustee to appoint and remove Substitute Trsutees may be exercised in his or its own discretion, and shall be exercised if

directed in writing by a majority in interest of the legally competent beneficiaries to whom income may then be paid.

SIXTH: The situs of the Trust Estate may be transferred to such other place as the Trustee deems to be for the best interests of the Trust Estate.

SEVENTH: Each and every trust, if any, still in existence on the day twenty-one (21) years after the death of the last to survive of myself and of all the beneficiaries herein named or described who are living at the date of my death shall forthwith terminate.

EIGHTH: No disposition, charge or encumbrance of either the income or principal of either of the Trust Estates (other than in the exercise of the power of appointment given my said wife over Trust A), or of any part thereof, by any beneficiary hereunder by way of anticipa-

tion, shall be of any validity or legal effect, or be in any wise regarded by the Trustee, and no such income or principal, or any part thereof, shall in any wise be liable to any claims of any creditor of any such beneficiary.

NINTH: Upon the death, resignation or other inability to act as Trustee hereunder of said WILLIAM W. WIRTZ, I nominate and appoint ARTHUR M. WIRTZ, Successor Trustee. In the event neither WILLIAM W. WIRTZ nor ARTHUR M. WIRTZ are [sic] able to act, I nominate and appoint THE FIRST NATIONAL BANK OF CHICAGO, Successor Trustee. The Trustee from time to time acting shall have all the same powers, duties and discretions herein conferred or imposed upon the Trustee named herein.

Any successor to the business of said THE FIRST NATIONAL BANK OF CHICAGO, whether by reorganization or otherwise,

shall succeed as Trustee hereunder.

The expression "Trustee" shall denote the Trustee from time to time qualified and acting and generally words importing the masculine gender shall include the feminine; words importing the feminine gender shall include the masculine; words importing the singular number shall include the plural; words importing the plural number shall include the singular; and the context of the Will shall be read accordingly when the facts require it.

TENTH: A. Any Trustee at any time acting hereunder may resign by delivering his or its written resignation to a majority in interest of the adult and otherwise legally competent beneficiaries to whom income may be paid hereunder, and if there be no such beneficiaries, to the successor Trustee entitled to act by reason of such resignation.

B. A majority in interest of the adult and otherwise legally competent beneficiaries then entitled to receive income hereunder may remove any corporate Trustee at any time acting hereunder by instrument in writing delivered to it and may, without liability to any present or future beneficiary of Trust A or Trust B, approve the accounts of and give a full and complete release and discharge to any resigned (or removed) Trustee hereunder (and to the legal representative of any deceased or legally incompetent individual Trustee) and may appoint any bank or trust company (having a combined capital and surplus of not less than Ten Million Dollars ($10,000,000.00), situated in the United States as successor corporate Trustee hereunder. It is my intention to vest in such person or persons the power to determine for and on behalf of all

beneficiaries the wisdom and propriety of giving any such approval, release and discharge, even though such person's or persons' interests may possibly be or become adverse to those of other beneficiaries; and it shall not be necessary to consult or to procure the concurrence of any remainderman or other party having a vested or contingent or other interest in Trust A or Trust B; and any such approval, release and discharge shall be binding upon all beneficiaries and shall constitute (1) a complete bar to any action by any beneficiary to question any transaction for the period covered by the account so approved, and (2) a valid and effective release with respect to any such transaction, with all the force and effect of a decree of a court of competent jurisdiction judicially settling such accounts and discharging such Trustee or

representative from any and all liability in respect to the administration of the Trust Estate in such transaction. No successor Trustee shall be liable or responsible for any acts or defaults of any predecessor Trustee or for any losses of expenses resulting from or occasioned by anything done or neglected to be done in the administration of the Trust Estate prior to his or its becoming a Trustee, nor be required to inquire into or take any notice of the prior administration of the Trust Estate.

ELEVENTH: In the event that my wife, MARY NORRIS, shall renounce the provisions of this Will, then my estate shall be administered and this Will shall be construed in the same manner as if my wife had predeceased me.

TWELFTH: In the event that my wife and I shall be killed in a common accident

or as the result of a common disaster or under such circumstances that it is impossible to determine which of us died first, it shall be presumed that she survived me, and this presumption shall apply throughout this Will.

THIRTEENTH: A. I hereby nominate and appoint my wife, MARY NORRIS and WILLIAM W. WIRTZ, as Executors of this my Last Will and Testament, and I hereby give to them as such Executors full power and authority at any time or times to sell, mortgage, pledge, exchange or otherwise deal with or dispose of the property comprising my estate upon such terms as they shall deem best, to settle and compound any and all claims in favor of or against my estate as they shall deem advisable, and for any of the foregoing purposes to make, execute and deliver any and all deeds, contracts, mortgages, bills

of sale or other instruments necessary or desirable therefor. My Executors are expressly authorized to postpone final distribution of my estate pending the final determination of all tax liabilities in connection therewith.

B. I also authorize my Executors to join with my wife in the filing of any federal income tax returns for any year or years for which I have not filed such return or returns prior to my death and to pay from my estate all or any portion of the tax shown to be due thereon and any deficiency, interest or penalties which subsequently may be determined to be due as they shall deem proper. I further authorize my Executors to consent to any gifts made by my wife as being made one-half (1/2) by me for the purposes of the Federal Gift Tax Law. The exercise of this authority and discretion by my

Executors shall be final and conclusive and not subject to question by any person interested in my estate.

C. Wherever, under the applicable law, my Executors may use certain costs and expenses incurred in the administration of my estate, either as deductions to reduce the federal income tax liability of my estate or the federal estate tax liability thereof, my Executors shall use such deductions in such manner as they in their sole judgment believe will require the smallest combined federal estate tax and federal income tax to be paid from my estate, without regard to the effect thereof upon the comparative values of the trusts created hereunder, and the Trustee heretofore named shall not make any adjustment in either the income or principal of the several trusts created hereunder. In addition, I give my

Executors all the powers, rights, duties, discretions and immunities herein given to my Trustees with respect to the trust property, the same to be exercised by my Executors without application to or confirmation by any court. During the period of administration of my Estate, my Executors are authorized and empowered to join with my Trustees in the exercise of all powers and discretions given to my Trustees.

D. It is my desire that no bond, other than his or her personal bond, shall be required of my individual executors for the faithful performance of his or her duties as such Executor.

E. In the event of the death, refusal, inability to act, resignation or removal as Executor hereunder of WILLIAM W. WIRTZ, I nominate and appoint ARTHUR M. WIRTZ, Successor Executor and direct that

no bond other than his personal bond shall be required of ARTHUR M. WIRTZ for the faithful performance of his duties as such Executor; and in the event none of my individual Executors are able to act I nominate and appoint THE FIRST NATIONAL BANK OF CHICAGO as successor Executor, with all the powers and duties herein conferred or imposed upon my Executors with the same force and effect as if it had originally been named.

IN WITNESS WHEREOF, I have set my hand and seal to this, my Last Will and Testament, consisting of twenty-one (21) typewritten pages, this page included, on the margin of each of which, except this page, I have affixed my signature or initials for better identification this 4 day of May, A.D. 1965.

\s\ James D.Norris(SEAL)

We, the undersigned, hereby certify that the foregoing instrument was on the day of the date thereof signed, sealed, published and declared by the Testator, as and for his Last Will and Testament, in the presence of us, who, in his presence and in the presence of each other have, at his request, hereunto subscribed our names as witnesses of the execution thereof the day and date above written, and we hereby certify that at the time of the execution hereof we believe the Testator to be of sound and disposing mind and memory.

\s\ Gertrude M. Knowles

Residing at 3270 Lake Shore Drive

Chicago, Illinois

\s\ Dorothy Mullen

Residing at 7619 Sheridan Road

Chicago, Illinois

\s\ [Unreadable]

Residing at 1202 Greenacres Lane

Mt. Prospect, Illinois

FIRST CODICIL TO LAST WILL AND TESTAMENT

OF

JAMES D. NORRIS

I, JAMES D. NORRIS, of Chicago, Illinois, hereby make this First Codicil to my Last Will and Testament dated May 4, 1965.

I

I hereby revoke paragraph B-1 of article THIRD on page 4 of my said Will and substitute in lieu thereof the following paragraph:

"B-1. (a) In the event MRS. A. S. MATTHEWS, now residing at Toronto, Canada, survives me, I hereby direct my Trustee to pay to her, during her lifetime, income from my trust estate in the sum of Five Hundred dollars ($500.00) monthly.

(b) In the event JOHN

ARTHUR JOHNSON of Mattituk, Long Island, New York, survives me, I hereby direct my Trustee to pay him during his lifetime, income from my trust estate in the sum of Five Hundred Dollars ($500.00) monthly."

II

I hereby cancel and delete paragraph B-5 of article THIRD on page 6 of my said will and incorporate in its place and stead the following paragraph:

"B-5. Upon the death of my daughter, SUSAN MARY NORRIS, for whose primary benefit Trust B is then being held by the Trustee in trust hereunder, or upon my death, if she shall predecease me, the Trustee shall pay and distribute all of such then remaining portion of Trust B, to the extent to which the same shall not

have vested in my daughter, to her then living lawful descendants, per stirpes [sic], or if no lawful descendants of my daughter shall then be living, such remaining portion of Trust B shall be distributed in the following manner:"

III

I revoke and cancel subparagraph 2 of article THIRD on page 6a of my said Will and incorporate in its place and stead the following new subparagraph 2:

"2. Subject to the provisions of B-1 of this article, the balance of said Trust B, as then constituted, shall be distributed as hereinafter provided:

(a) One-half (1/2) part thereof to be retained in trust, the income of which shall be paid by my Trustee to VALERIE A. KALAS, MARILYN V. KALAS and GERALDINE McLAUGH-

LIN, in equal protions during their respective lifetimes.

In the event GERALDINE McLAUGHLIN is not then living, or in the event of her subsequent death during the term of the trust, leaving one one or more of her children, namely WILLIAM E. McLAUGHLIN, CAROL A. McLAUGHLIN and MARY C. McLAUGHLIN, then living, the survivor or survivors of them shall succeed to the income payments of such parent for their respective lifetimes, or if none of said children are then living, or upon the death of the last to survive of them during the term of the trust, such share of income shall be added to that of VALERIE A. KALAS, if living, otherwise to that of MARILYN V. KALAS.

In the event MARILYN V. KALAS is not then living, or upon her subsequent death during the term of the trust, the income to which she would have been entitled shall be added to that of VALERIE A. KALAS, but if VALERIE A. KALAS is not then living, to that of GERALDINE McLAUGHLIN if then living, otherwise to her said children in the manner and

upon the conditions aforesaid.

In the event VALERIE A. KALAS is not then living, or upon her subsequent death during the term of the trust, the income to which she would have been entitled shall be added to the income of the hereinafter named beneficiaries as follows:

(i) One-half (1/2) thereof to GERALDINE McLAUGHLIN if then living, otherwise to her said children then living in the manner and upon the conditions aforesaid;

(ii) One-half (1/2) thereof to MARILYN V. KALAS or if she is not then living to GERALDINE McLAUGHLIN if living, otherwise to her said children then living in the manner and upon the conditions aforesaid.

Upon the death of the last to survive of the said VALERIE A. KALAS, MARILYN V. KALAS, GERALDINE McLAUGHLIN, WILLIAM E. McLAUGHLIN, CAROL A. McLAUGHLIN and MARY C. McLAUGHLIN, the remaining principal and accrued income thereof shall be distributed in equal shares to the

trusts hereinafter created in subparagraph (b).

(b) The remaining portion of said balance of Trust B shall be distributed as follows:

(i) One-half (1/2) part thereof to the Eastern Long Island Hospital Association, Greenport, Long Island, New York, to be held in trust to establish and create the JAMES D. NORRIS MEMORIAL, the income of which trust shall be used for its general purposes and the principal thereof to be held in perpetuity; and

(ii) One-half (1/2) part thereof to the Presbyterian Church, Mattituck, Long Island, New York, to be held in trust to establish the JAMES D. NORRIS MEMORIAL, the income from which trust shall be used for its general purposes and the principal thereof to be held in perpetuity."

IV

I hereby ratify, republish and confirm

my said Last Will and Testament, except as modified by this, my First Codicil thereto.

IN WITNESS WHEREOF, I have hereunto set my hand and seal to this my First Codicil to my said Last Will and Testament, consisting of four (4) typewritten pages, this page included, on the margin of each of which, except this page, I have affixed my signature or initials for better identification this 26 day of May, 1965.

\s\ James D. Norris(SEAL)

We, the undersigned, hereby certify that the foregoing instrument was on the date thereof signed, sealed, published and declared by JAMES D. NORRIS as and for a First Codicil to his Last Will and Testament, in our presence, who, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses thereto, believing the said JAMES D. NORRIS at the time of so signing to be of sound mind and memory.

\s\ Clyde LeFiles

Residing at 742 Sevilla Ave.
Coral Gables

\s\ Dolores Hagan

Residing at 7621 S.W. 61 Ave.
South Miami, Fla.

\s\ Omar E. Stacy

Residing at 5700 S.W. 51st
Miami, Florida

No. 83-1471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM W. WIRTZ, individually and as trustee, ARTHUR M. WIRTZ, individually and as trustee, ST. LOUIS ARENA CORPORATION, a corporation, ARENA BOWL, INC., a corporation, and WIRTZ CORPORATION, a corporation,

Petitioners,

vs.

SUSAN MARY NORRIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

EDWARD J. ROSS
153 E. 53rd Street
New York, New York 10022
(212) 888-0800
Attorney for Respondent

March 8, 1984

QUESTIONS PRESENTED FOR REVIEW

1. Where the executor of a decedent's estate sells stock owned by the estate to corporations owned and controlled by him and his father, and he obtains the prior written approval of such sales from the beneficiary of the estate to whom such stock was bequeathed in trust, through fraudulent misrepresentations and omissions of material facts as to the value of such stock, can such beneficiary be deemed a seller of such stock, with standing to sue under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder?

2. Where a will requires the prior approval of the beneficiary of a trust before the trustee can purchase stock owned by the trust, is such approval required where the trustee, in his capacity as executor, sells such stock before the trust is established, and the sales are made to closely-held corporations owned by him and his father, rather than to himself personally?

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Statement of the Case

Respondent Susan Mary Norris ("Susan Norris"), the daughter of James Norris, deceased, is the beneficiary of the Estate of James Norris (the "Norris estate") and of a trust established by his will. Petitioner William W. Wirtz is the executor of the Norris estate and sole trustee of said trust.

The Norris estate owned at least 49% of the stock of petitioners St. Louis Arena Corporation and Arena Bowl, Inc.

Petitioner Wirtz Corporation, owned by the two Wirtzes, purported to own 51% of the stock of these corporations. The Norris estate also owned a minority stock interest in Judge & Dolph, Ltd., of which the Wirtz Corporation owned 80% of the stock. When the sales were made, William Wirtz was the President and a director, and his father was Chairman of the Board of Directors, of each of the three corporations.

The will authorizes Wirtz, as trustee, to purchase stock owned by the trust for the benefit of Susan Norris "provided he has [her] approval . . . with respect to such purchase" (App. 85).

William Wirtz, as executor of the Norris estate and before funding said trust, sold the estate's stock in St. Louis Arena Corporation to that corporation and in Arena Bowl, Inc. to that corporation, so that the Wirtz Corporation became the sole owner of both corporations. Also, the Wirtz corporation directly purchased the estate's minority interest in Judge & Dolph, Ltd. As the Court of Appeals put it, "when the dealing was over, the Wirtzes effectively controlled all three of the closely-held corporations in which the estate had held stock and to that extent became more of a beneficiary under the will than did plaintiff, the decedent's daughter" (App. 5). Wirtz obtained Susan Norris' approval of the sales, just after she became 18 (App. 5), and without her being represented by counsel.

The complaint, which petitioners have omitted from the Appendix but which is summarized in the opinions of the District Court (App. 27-37) and the Court of Appeals (App. 3-6), avers that William Wirtz knew that the price paid to the estate for the stock was below its fair market value and that he "knowingly concealed the true value of the stock from plaintiff" (App. 31-32). The complaint further alleges that "[i]t was in the course of inducing her [Susan Norris'] uninformed approval of the sales that the defendants allegedly made the false statements substantially affecting the value and fair price of the stocks they were thereby acquiring." (App. 5-6). With

respect to Judge & Dolph, Ltd., the complaint alleges that Wirtz also falsely represented that such corporation was "to be liquidated and dissolved," implying that it was going out of business, although there was no such intention and, as the complaint further alleges, its business "is still owned and operated by the Wirtz family and is one of the largest wholesale liquor companies in the Chicago metropolitan area" (App. 35).

The complaint, which asserts claims under each of the three subdivisions of Rule 10b-5, avers that defendant "William Wirtz was engaged in a scheme to defraud, and did defraud Susan Norris, in violation of Section 10(b) of the 1934 Act and Rule 10b-5" (App. 32).

Petitioner moved to dismiss the complaint on the ground that Susan Norris lacked standing to sue under Rule 10b-5, since she was not a seller of the stock; that her prior approval of the sales was not required and that therefore she did not have an investment decision to make in connection with such sales. While Wirtz had deemed her approval to be required and obtained it through fraudulent misrepresentations and omissions, it is petitioners' position that the will required Susan Norris' approval only if Wirtz personally purchased the stock, and not where the purchase was made by close corporations owned by him and his father, and only if he, as a trustee, sold the stock to himself, and not if he, as an executor, sold the stock to himself.

The Opinions Below

The District Court, which dismissed the complaint, held that Susan Norris, as beneficiary, was affected by the sales made by her fiduciary and therefore has standing to sue under Rule 10b-5. However, it held that the will "does not require her approval" (App. 52), and interpreted the will as requiring her approval only if Wirtz personally purchased the stock and not where "the closely-held corporations were the purchasers" (App. 54). Accordingly, it held that "[s]ince plaintiff had no

voice in the decision to sell the stock in the three defendant corporations, any nondisclosure of material facts by defendants does not meet the 'in connection with a purchase or sale' requirement of Section 10(b) and Rule 10(b-5)" (App. 53).

The Court of Appeals, which reversed, unanimously held that "the plaintiff experienced the direct impact of the securities transactions, for she was the beneficiary of the trust involved" (App. 11). It stated that it would apply " 'a logical and flexible construction of the term "purchaser-seller" in order to accommodate the avowed purpose of Sec. 10(b) of protecting the investing public and of ensuring honest dealings in securities transactions,' " quoting *James v. Gerber Products Co.*, 483 F.2d 944, 948 (6th Cir. 1973) (App. 11-12).

As to the interpretation of the special language in the Norris will, two panel members held that the approval provisions applied whether Wirtz made the sale as executor or as trustee, and whether he sold to himself personally or to close corporations owned by him and his father. The dissenting judge deemed the approval requirement limited to a sale by the trustee to himself personally.

Reasons for Denying the Petition

1. Susan Norris has Standing to Sue

This case presents neither special nor important reasons for grant of review. There is no conflict in circuits as to whether the beneficiary of an estate or trust has standing, as a seller, to sue under Rule 10b-5 where the fiduciary made the sales and fraud was used in connection therewith. The decision below is in accord with decisions in those circuits which have considered this question. Indeed, the petition does not suggest a conflict in circuits.

The District Court and the three judges of the Court of Appeals, all agreed that Susan Norris, as the beneficiary of the estate which made the sale, had standing to sue. The District Court held that she is the one "who would feel the impact if

any fraud occurred in the stock sales," and that as the "beneficiary of a residuary trust . . . , the sale of such assets for any unreasonably low price would *directly* affect the *plaintiff* . . . and not the seller, executor-trustee William Wirts" (italics in original text) (App. 43-44).

The Court of Appeals, reviewing cases in other circuits (*Kirshner v. United States*, 603 F.2d 234, 240-41 (2d Cir. 1978), *cert. denied*, 442 U.S. 909 (1979), and *James v. Gerber Products Co., supra*) (App. 12), stressed that "the plaintiff experienced the direct impact of the securities transaction, for she was the beneficiary of the trust involved" (App. 11). The dissenting judge agreed that Susan Norris had standing to sue, and as to this issue stated that "[t]he majority opinion is so persuasive that . . . I could have written it myself" (App. 18-19).

It is so clear that a beneficiary of an estate or trust has standing to sue under Rule 10b-5, that such issue lacks the significance required for grant of certiorari,—apart from the lack of a conflict in circuits.

2. The Norris Will Required Susan Norris' Approval of the Sales

The petition urges that the approval requirement in the Norris will applies only where stock is sold "*by the individual trustee*" and is "not applicable to sales from the estate by the co-executors" (Pet. 4-5) (Italics in original text). Though petitioners obtained Susan Norris' prior written approval, they claim that it was not really required and, accordingly, that she had no investment decision to make; that hence it was irrelevant whether Wirtz obtained her approval through fraudulent misrepresentations and omissions; and that this case is controlled by *O'Brien v. Continental Illinois Bank & Trust Co.*, 593 F.2d 54 (7th Cir. 1979), which the Court below erred in not following.

This is clearly a unique issue as to the interpretation of special language in the Norris will, which affects no one other

than the litigants in this case and which lacks the importance requisite to grant of certiorari.

Furthermore, the Court of Appeals was clearly correct when it held that "the purchases by the close corporations controlled by defendants William and Arthur Wirtz were in fact, or virtually, a purchase by defendant-trustee William Wirtz, so that plaintiff's prior approval of the sale was essential under the will," and that "the only reasonable interpretation of the testamentary provision is that it was intended to prevent any self-dealing transaction, regardless of the form, in which the individual trustee purchased securities beneficially owned by the plaintiff" (App. 60). It is hard to conceive of a court reaching a contrary conclusion.

Moreover, the issue as to the need for Susan Norris' approval is relevant only to her claim under subdivision (b) of Rule 10b-5, as to whether her approval was obtained through untrue statements or omissions of material fact. However, the complaint also alleges that the defendants' acquisition of all the stock owned by the estate in such three corporations, at a fraction of its true value, through the acts and procedures engaged in by the Wirtzes, constituted a scheme to defraud, violative of subdivision (a), and operated as a fraud and deceit upon Susan Norris, violative of subdivision (c). Establishing that Susan Norris' approval was obtained through fraudulent misrepresentations and omissions is not an element of her claims under subdivisions (a) and (c) of Rule 10b-5.

In *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191, 198 (1963), which arose under the Investment Advisers Act of 1940, which contains the same language as subdivision (c) of Rule 10b-5, this Court held that there is a "broad proscription against 'any . . . practice . . . which operates . . . as a fraud or deceit;' " that there was no need for a "specific proscription against nondisclosure;" and that a "general proscription against fraud" sufficed to state a claim. *See also Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 381 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975); *Pappas v.*

Moss, 393 F.2d 865, 869 (3d Cir. 1968); *Rekant v. Desser*, 425 F.2d 872, 880, 882 (5th Cir. 1970); and *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515, 527 (8th Cir. 1973).

3. The Decision Below is not Contrary to, But is in Accord With, *Santa Fe Industries* and *Blue Chips Stamps*

The petition urges that "[t]he appellate court's decision directly conflicts with" *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977) and *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (Pet. 7). *Santa Fe Industries* did not involve a sale of stock, but a short-form merger under Delaware law, the requirements of which were fully satisfied. This Court there noted that "the complaint did not allege a material misrepresentation or non-disclosure with respect to the value of the stock" (430 U.S. at 469); that "the complaint failed to allege a material misrepresentation or material failure to disclose" (p. 474); that "there was no 'omission' or 'misstatement' in the information statement accompanying the notice of merger" (*id.*); and that "the transaction, if carried out as alleged in the complaint, was nether deceptive nor manipulative and therefore did not violate either § 10(b) of the Act or Rule 10b-5." (*id.*)

Santa Fe Industries made clear that a "claim of fraud and fiduciary breach . . . states a cause of action under . . . Rule 10b-5" where "the conduct alleged can be fairly viewed as 'manipulative or deceptive' within the meaning of the statute" (430 U.S. at 473-74). This Court's opinion noted that the many Court of Appeals cases which sustained a Rule 10b-5 complaint where there was fiduciary misconduct all "involved an element of deception as part of the fiduciary misconduct held to violate Rule 10b-5" (430 U.S. at 475 n.14). However, it held that there the "breach of fiduciary duty" did not violate § 10(b) and Rule 10b-5 only because it was committed "without any deception, misrepresentation, or non-disclosure" (430 U.S. at 476).

Here, in contrast, Wirtz's beach of fiduciary duty was accomplished through deception, misrepresentation and non-

disclosure. The Court of Appeals, after analyzing the complaint, held that "plaintiff has made sufficient allegations of deception by the defendants to satisfy the requirements for a Section 10(b) or Rule 10b-5 violation announced in *Santa Fe Industries*." (App. 8-9). *Santa Fe Industries* mandates the decision of the Court of Appeals.

In *Blue Chip Stamps*, the stock was "neither purchased nor sold", and "[t]he complaint alleged that class members because of and in reliance on the false and misleading prospectus failed to purchase" (421 U.S. at 725, 727). This Court simply held that a Rule 10b-5 case requires a sale or purchase, and could not be based on a decision not to sell, allegedly influenced by fraudulent misrepresentations and omissions. Here, of course, sales were made.

Petitioners' reliance on *Blue Chip Stamps* is another aspect of their erroneous position that Susan Norris is not a seller because the fiduciary made the sale.

4. The Existence of a State Remedy is Not a Bar to a Rule 10b-5 case

The petition urges error because Susan Norris has a remedy in the state court against the trustee for breach of fiduciary duty and illegal self-dealing (Pet. 9). This position has been foreclosed, at least since *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1971), which states:

> Section 10(b) must be read flexibly, not technically and restrictively. Since there was a "sale" of a security and since fraud was used "in connection with" it, there is redress under § 10(b), whatever might be available as a remedy under state law.

Petitioner's reference to Illinois law, as it applies to the construction of Illinois wills, and their contention that the Court of Appeals applied the wrong principles of Illinois law in interpreting the Norris will (Pet. 11), as a basis for obtaining

certiorari, is misplaced. This Court does not grant certiorari to decide whether a Court of Appeals correctly applied state law. Even where it grants certiorari, it will "decline to review the state-law question" since "[t]he federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues." *See Butner v. United States*, 440 U.S. 48, 51, 58 (1979).

Conclusion

It is respectfully submitted that this petition does not meet any of this Court's criteria or standards for exercising its discretion to grant certiorari; that the Court of Appeals decision is correct in all respects; and that certiorari should be denied.

Respectfully submitted

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New York, New York 10022
(212) 888-0800
Attorney for Respondent

March 8, 1984